INDEX

	PAGE
EUGENE RODRIGUEZ:	
Docket Entries	1a
Complaint and Petition	9a
Answer	15a
Memorandum-Decision and Order of October 24, 1969	16a
District Court Opinion and Order (December 23, 1969)	18a
Decision of Court of Appeals Panel Reversing District Court	28a
Denial of Petition for Rehearing	43a
MICHAEL KATZOFF:	
Docket Entries	44a
Affidavit of Poverty	49a
Affidavit in Support of Show Cause Order	51a
Order to Show Cause	58a
Excerpts from District Court Hearing	60a
District Court Opinion (August 18, 1970)	62a
Order of August 18, 1970	82a
Decision of Court of Appeals Panel Reversing District Court	84a
Denial of Petition for Rehearing	89a
JOHN KRITSKY:	
Docket Entries	90a
Complaint and Petition	96a
Answer	102a
Memorandum-Decision and Order of October 28, 1969	103a
District Court Opinion and Order (June 12, 1970)	104a
Order to *In Banc* (July 19, 1971)	112a
In Banc Opinion and Order (January 25, 1972)	113a

Eugene Rodriguez
Docket Entries.

(UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, 69 CIVIL 348)

Docket Entries.

PROCEEDINGS

Date
1969

Sept. 29—Filed Complaint and/or Petition for Writ of Habeas Corpus and Motion.

Oct. 6—Motion for Bail. One week for answering Affidavit. Decision reserved.

Oct. 9—Filed Affidavit in opposition to motion for bail.

Oct. 13—Filed Affidavit of personal service of Affidavit on Eugene Rodriguez on October 10, 1969.

Oct. 16—Filed Summons served October 2, 1969 on Joseph David, Deputy Comm. of Correction for Paul D. McGinnis, Comm. of Corr.; served October 2, 1969 on Victor Zuckerman, Atty. Board of Parole, for Russell G. Oswald, Chairman of the Board of Parole; served Sept. 30, 1969 on Frank Ryan, Head Clerk, for J. Edwin LaVallee, Warden; served October 14, 1969 on Francis A. Ryan, Head Clerk for J. Edwin LaVallee, Chairman of the Board Prison; served October 2, 1969 on Victor Zuckerman, Atty. New York State Board of Parole; served October 2, 1969 on Joseph David, Deputy Commissioner of Correction, New York State Dept. of Correction.

Oct. 16—Filed Answer of Defendants.

Oct. 16—Filed Affidavit of Service personally of Answer of Defendants.

Oct. 27—Writ of Habeas Corpus Ad Testificandum. returnable October 31, 1969 at 10 A.M. at Albany, New York.

Eugene Rodrigues Docket Entries.

Date

Oct. 27—Writ Issued and delivered to U. S. Marshal for service.

Oct. 27—Filed Memorandum-Decision and Order—Foley, D. J. for an evidentiary hearing to be held October 21, 1969 at Albany, N. Y. at 10 A.M. Attorney Richard A. Kohn is duly assigned as Attorney for plaintiff. The motion for bail is denied. It is So Ordered—James T. Foley, U.S.D.J.

Oct. 30—Filed Writ of Habeas Corpus ad Testificandum served October 28, 1969 on J. Edwin LaVallee, Warden and Chairman of the Prison Board of Clinton State Prison.

Oct. 31—Return of Writ of Habeas Corpus. (Pre-Trial Conference 3 hrs.) Trial. Petitioner satisfied with attorney assigned him and sufficient time to discuss same. Writ continued until Monday morning at 11:00 A.M. in Albany. Nov. 3 Trial continued. Defendant moves for dismissal of petition on grounds stated. Motion denied on jurisdictional grounds and reserve decision on motion to dismiss on failure of proof. Briefs to be filed with Judge Foley by Next Monday, November 10, 1969.

Nov. 12—Filed Memorandum of Law on behalf of Defendants-Respondents.

Nov. 14—Filed Memorandum on Behalf of Plaintiff-Petitioner.

Nov. 25—Filed Minutes of Hearing held October 31, 1969 before Hon. James T. Foley.

Eugene Rodrigues Docket Entries.

Date

Dec. 28—Filed Defendant's Exhibit D—Inmates Rule Book, State of New York Revised 9/1/68.

Dec. 28—Filed Defendant's Exhibit E—State of N. Y. Dept. of Correction Employees Rule Book.

Dec. 28—Filed Photostatic copies of Plaintiff's Exhibits.

Dec. 28—Filed Memorandum-Decision and Order—Foley, D. J. that the disallowance of 120 days and cancellation of 120 days good behavior credit time is void and unlawful as violative of the provisions of the Fourteenth Amendment of the United States Constitution. The Commissioner of Correction of the State of New York is hereby directed to restore the remaining period of good time credit to the plaintiff. Such allowance will entitle the plaintiff to release forthwith, etc. If such release is not accomplished within a reasonable time, the attorney for the plaintiff shall submit a writ of habeas corpus to effect such release. Judgment shall enter in favor of the plaintiff granting the relief specifically outlined herein and this decision is the judgment. It Is So Ordered—James T. Foley, U.S.D.J.

Dec. 24—Mailed notice re Judgment to: Richard A. Kohn, Esq., 100 State St., Albany, N. Y. 12201 and Hon. Louis J. Lefkowitz, Atty. General, The Capitol, Albany, N. Y. 12224 Att: Mr. Timothy F. O'Brien, Asst. Atty. General.

Eugene Rodrigues Docket Entries.

1970

Jan. 6—Filed Notice of Appeal.

Jan. 7—Forwarded Certified Record on Appeal consisting of original papers to Clerk, USCA.

Jan. 14—Filed Receipt—Clerk, U.S.C.A. 2nd Circuit for cert. copy of docket entries and original papers of Record on Appeal.

Jan. 30—Filed Exhibit A—Disciplinary Report from Sing Sing Prison—10/30/68.

Jan. 30—Filed Defendant's Exhibit B—Disciplinary Report from Sing Sing Prison—10/31/68.

Jan. 30—Filed Defendant's Exhibit C—Letters of 11/1/68 from Deegan to Comm. McGinnis.

Jan. 30—Filed Defendant's Exhibit F—Official compilation of Rules of Dept. of Correction.

(UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, DOCKET No. 34567)

DATE	FILINGS—PROCEEDINGS
1- 8-70	Received record (original papers of District Court)
2- 2-70	Received supplemental record (original papers of District Court)
2-16-70	Filed record and supplemental record (original papers of District Court)
3-17-70	Filed order removing original record (appellants)

Eugene Rodriguez Docket Entries.

DATE	FILINGS—PROCEEDINGS
3-30-70	Filed 4 copies brief, appellants with proof of service
3-30-70	Filed order extending time to file notice re deferred appendix to 3-30-70
3-30-70	Filed notice re deferred appendix
4- 1-70	Filed motion for appointment on appeal
4- 9-70	Filed affidavit of service by mail
4-10-70	Filed order granting motion of Richard A. Kohn to be appointed as counsel for appellee
5- 7-70	Filed brief, appellants with proof of service
6-10-70	Filed motion for calendar preference and early argument date, etc. with proof of service
6-15-70	Filed order granting motion for preference and for leave to file appendix; appellee shall file its brief by 6-26-70 together with a motion to dismiss appeal; appellant's reply brief by 7-10-70; argument shall be heard 7-16-70
6-15-70	Filed appendix, appellants
6-29-70	Filed brief, appellee, with proof of service (mailed 6-26-70)
6-29-70	Filed motion to dismiss with proof of service (mailed 6-26-70)
7- 1-70	Filed motion to file instanter brief of amici curiae (N.A.A.C.P.)
7- 9-70	Filed order granting motion to file brief amici curiae (NAACP)

Eugene Rodrigues Docket Entries.

DATE	FILINGS—PROCEEDINGS
7- 9-70	Filed brief for Amici Curiae, N.A.A.C.P. with proof of service
7-10-70	Filed affidavit in opposition to motion to dismiss with proof of service
7-10-70	Filed reply brief, appellant with proof of service
7-16-70	Argument heard (By: Waterman, Moore & Hays, CJJ)
3- 3-71	Filed order denying motion to dismiss
3-16-71	Judgment Reversed, Hays, CJ
3-16-71	Dissenting in separate opinion, Waterman, CJ
3-16-71	Filed judgment
3-30-71	Filed petition for rehearing and rehearing in banc with proof of service.
7-19-71	Filed order denying petition for rehearing
7-19-71	Filed order granting reconsideration in banc, etc.; the in banc proceedings in the three cases are consolidated; if petitioners desire to file further briefs, they may do so by 8-16-71; if respondents desire to file further briefs, they may do so by 9-13-71 further oral argument will not be heard unless otherwise ordered (consolidated with 35300 and 35253)
10-12-71	Filed order re in banc judges of the court and members of the respective panels who have taken senior status, will hear oral argument 11-4-71 at 2 P.M. Room 506; if counsel desire to file additional briefs on these subjects these should be served and filed by 11-1-71 (& in 35253, 35300)

Eugene Rodriguez Docket Entries.

DATE	FILINGS—PROCEEDINGS
11- 1-71	Filed brief, appellants (on rehearing) with proof of service (& in 35253 and 35300)
11- 4-71	Argument heard (by: Friendly, ChJ, Waterman, Moore, Smith, Kaufman, Hays, Feinberg, Mansfield, Mulligan, Oakes & Timbers, CJJ) (& in 35253 and 35300)
1-25-72	Judgments Affirmed, Friendly, Ch. J., (& in 35253, 35300)
1-25-72	Friendly, ChJ with whom Mulligan, CJ joins concurring in separate opinion (& in 35253, 35300)
1-25-72	Waterman, CJ concurring in separate opinion (& in 35253, 35300)
1-25-72	Smith, CJ concurring in separate opinion (& in 35253, 35300)
1-25-72	Kaufman, CJ concurring in separate opinion (& in 35253, 35300)
1-25-72	Feinberg, CJ concurring in separate opinion (& in 35253, 35300)
1-25-72	Mansfield, CJ concurring in separate opinion (& in 35253, 35300)
1-25-72	Oakes, CJ concurring in separate opinion (& in 35253, 35300)
1-25-72	Timbers, CJ concurs in opinions of Smith, Kaufman & Feinberg (& in 35253, 35300)

Eugene Rodrigues Docket Entries.

DATE	FILINGS—PROCEEDINGS
1-25-72	Lumbard, CJ dissenting with whom Moore and Hays concur in separate opinion (& in 35253, 35300)
1-25-72	Filed judgment (& in 35253, 35300)
2-10-72	Issued Mandate (judgment) opinion on rehearing and order
2-10-72	Filed itemized and verified bill of costs
2-18-72	Filed statement of costs
2-18-72	Issued statement of costs
4-28-72	Filed notice of filing of petition for writ of certiorari (& in 35253, 35300)
6-20-72	Original record returned to district court (& in 35353, 35300)
6-23-72	Filed certified copy of order of Supreme Court granting petition for writ of certiorari (& in 35353, 35300)

Complaint and Petition.

Eugene Rodriguez, plaintiff-petitioner (hereinafter called the plaintiff), appearing pro-se respectfully alleges;

1. This action arises under the constitution of the United States, in particular Art. 1, Section 9 Cl. 2 and the Fifth, Sixth, Eighth, and Fourteenth Amendments thereto and under 28 U.S.C. #2241, 2254 and 42 U.S.C. #1983.

The jurisdiction of this court is invoked under 28 U.S.C. #1331, 1343 (3), 2241, 2254 and 42 U.S.C. #1983 and under Art. 1, Sec. 9, Cl. 2 of the Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments thereto.

2. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000) Dollars.

3. Relief is sought herein for petitioners release, pursuant to a writ of habeas corpus, from unlawful custody in violation of plaintiff's constitutional rights; for a declaratory judgment pursuant to 28 U.S.C. #2201 and 2202 and for a preliminary and permanent injunction pursuant to 28 U.S.C. #1651 and 42 U.S.C. 1983. Also plaintiff requests that nominal bail be set pending the final determination of the within habeas corpus for the reason that the issue may become moot if not conclusively determined through all the courts and the plaintiff will suffer irrepairable damage.

Precedent is had on such application for reasonable bail pending final disposition of these specific issues in Daniels vs. La Vallee, 69 Civil 118, U. S. D. C. Northern District of New York.

4. Plaintiff, a natural born citizen of the United States, was convicted after trial of Attempted Grand Larceny on February 14*th*, 1967 and sentenced to an indeterminate term of 1½ to 4 years on February 14*th* 1967 in the Bronx Supreme Court of Bronx County. He has served approxi-

mately 2 years 8 months in prison, without probation or parole, and is presently incarcerated at Clinton State Prison, Dannemora, New York.

5. The individual defendants in this proceeding are sued in their official capacity:

A. Paul D. McGinnis New York State Commissioner of Correction, whose principal office is located in Albany, New York, is charged with the duty of directing and supervising the activities of the defendant, Department of Correction, which administers the prisons and other correctional institutions and programs of New York State, pursuant to the New York Correction Law (herein after Corr. L. #5, 6A, 112, et seq. The Commissioner of Corrections is empowered to appoint the wardens of the various state prisons, including Clinton State Prison who serve under his direction, Corr. L. #234, 803 authorize the Commissioner of Corrections to formulate rules governing the allowance or disallowance of reductions in prison terms "for good conduct and for efficient and willing performance of duties assigned to . . . [prisoners] in prison or penitentiary [hereinafter referred to as "good behavior time credit"].

B. J. Edwin La Vallee, Warden of Clinton State Prison, is the person having direct and immediate custody of the plaintiff. Pursuant to Corr. L. 235, 803, the defendant La Vallee is charged with the duty of acting as Chairman of the "Prison Board" for Clinton State Prison, which determines allowance or disallowance of good behavior time credit.

C. Russell G. Oswald, whose principal office is located in Albany, New York is Chairman of the defendant New York State Board of Parole, which is empowered to determine the qualifications of prisoners for release on Pa-

role; pursuant to Corr. L. #210, et seq., and to supervise prisoners who have been released on parole or under the "Statutory" or conditional release" programs established by Corr. L. #220, 234, 803; Penal Law #70.30, 70.40 and described in greater detail in pargaraphs 6 & 7, *infra.*

6. Prior to September 1*st*, 1967, prisoners serving indeterminate sentences in New York State Prisons were eligible to participate in the "statutory release" program pursuant to Corr. Law #230, which provided that a prisoner serving an indeterminate sentence may earn up to five (5) days per month but no more than two months per year "good behavior time" credit towards the reduction of his maximum time, thereby qualifying the prisoner for mandatory release from prison under supervision of the Board of Parole after serving five-sixths of the maximum term.

7. In 1967, the New York Legislature enacted Corr. L. #803 and Penal L. #70.40 (B) establishing the "conditional release" program, under which a prisoner serving an indeterminate term could earn up to 10 days per-month good behavior time credit towards the reduction of his maximum term, thereby qualifying him for mandatory release from prison under the supervision of the Board of Parole after serving two-thirds of his maximum sentence, provided such prisoner elected to participate in the conditional release program and waived his rights under the "statutory release" program above described.

8. Plaintiff did in fact so elect to participate in the conditional release program and waived his rights under the statutory release program, above described.

9. By virtue of the foregoing, plaintiff is therefore fully qualified for and entitled to "conditional release" *on October 10th, 1969.*

10A. The defendants La Valle and Mc Ginnis, in violation of plaintiff's constitutional rights to due process of law and against the cruel and unusual punishment sections have denied, cancelled and disallowed good behavior time credit towards conditional release, amounting to *4 months and 14 days* to which plaintiff is entitled and have arbitrarily and capriciously extended plaintiff's prison term to *February 24, 1970.*

B. The previously mentioned 4 months and 14 days good behavior time to which plaintiff is entitled under the previously mentioned New York Statutes were cancelled and revoked completely without Due Process of Law. This specific issue is presently before the Courts for determination. See Greenfield vs. Seafati (D. C. Moss), 277 F. Supp. 644; Aff'd per curiam, 390 U. S. 713; U. S. ex rel. Cambell vs. Pate, 7th Cir., 401 F. 2nd 55.

11. The defendants La Valle and Mc Ginnis threaten to unlawfully and unjustly imprison and detain the plaintiff in their custody and pursuant to their order in violation of plaintiffs constitutional rights under the Fifth, Sixth, and Fourteenth, Amendments in that such denial, cancellation and disallowance of good behavior time credit was illegally effected by the defendants La Valle and Mc Ginnis.

A. Without affording plaintiff notice of any charges or a fair hearing at which plaintiff would have the assistance of counsel and the opportunity to confront witnesses, present evidence on his own behalf; and a specification of the grounds and underlying facts upon which the defendant's determination was based.

B. Without substantial evidence or even a basis in fact to support the determination.

C. On information and belief, said determination to deny, cancel and disallow good time behavior credit was

arbitrary and capricious and an abuse of discretion, and was part of a specific program of harassment, persecution, oppression directed at the plaintiff because of the plaintiffs former position. Plaintiff was formerly an attorney, State Assemblyman, and elected State Senator.

D. The harassment and persecution is clear when plaintiff has been told at least 10 times by 4 prison officials that the 4 months and 14 days less 10 days "box time" *will be immediately restored to him* if plaintiff will testify as to information concerning Sing Sing Prison. Said information being unknown to the plaintiff. Also plaintiff has been told that he will be forced to lose every day of future good time for the same reason. Plaintiff has stated that he had nothing to say and that he doesn't know about what they the defendants are asking and the threat to take all his future good time and make him do day for day on the maximum is abritrary and capricious, and an abuse of discretion. It is also a program of harassment persecution and oppression directed specifically at the plaintiff.

12. All available and adequate State remedies have been exhausted.

13. No prior application has been made for the relief requested herein.

Wherefore, plaintiff prays for the following relief:

1. That a judgment issue declaring that determination of the defendants La Valle and Mc Ginnis and their agents denying, cancelling and disallowing 4 months and 14 days good behavior time credit towards plaintiffs conditional release was void, illegal and in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution for the reasons specified and set forth in paragraph 11.

2. Restraining the defendants La Valle and Mc Ginnis and their agents from denying, cancelling or disallowing good behavior time credit towards conditional release without adhering to procedural due process.

3. Issuing a writ of habeas corpus requiring the defendant Mc Ginnis to order plaintiffs conditional release from imprisonment on October 10th 1969.

4. To set bail as of October 10th 1969 on the plaintiff in a nominal amount pending the final determination of all the issues to avoid the issue becoming moot to plaintiff and order to avoid irreparable injury.

5. Granting such other and further relief as to this court may seem just and proper.

Dated September 25th 1969

Respectfully submitted,

/s/ Eugene Rodriguez
Eugene Rodriguez
43670
Box B
Dannemora, New York 12929

(Verified, September 25, 1969)

Answer.

Defendants, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, for an answer to the complaint of the plaintiff herein, allege as follows:

First Defense

The complaint fails to state a claim sufficient to establish the jurisdiction of this Court over the subject matter.

Second Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

Third Defense

That any denial, cancellation or disallowance of good behavior time credit to the plaintiff by the defendants in connection with plaintiff's sentence in the Bronx Supreme Court of Bronx County on February 14, 1967 was not in violation of plaintiff's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution nor was the same in violation of the plaintiff's rights under the New York State Constitution nor in violation of any Federal or State statutes governing plaintiff's incarceration in any prison of the State of New York pursuant to said sentence.

Wherefore, defendants respectfully pray that the complaint herein be dismissed.

Louis J. Lefkowitz,
Attorney General of the
State of New York.

(Verified by J. E. LaVallee, October 14, 1969.)

Memorandum-Decision and Order of October 24, 1969.

APPEARANCES:

EUGENE RODRIGUEZ, Petitioner Pro Se.

HON. LOUIS J. LEFKOWITZ, Attorney General, State of New York, Attorney for Defendants-Respondents.

TIMOTHY F. O'BRIEN, Asst. Attorney General of Counsel.

JAMES T. FOLEY, D. J.

MEMORANDUM-DECISION AND ORDER

This plaintiff-petitioner—and it is very rare—filed a civil rights complaint apparently with payment of the statutory fee on September 29, 1969. Thereafter a motion for bail was filed that I made returnable on October 6, 1969, a regular motion day of this Court held in Albany. In opposition to the motion for bail there has been filed an affidavit of Assistant Attorney General O'Brien. Therein it is stated the complaint was served upon a Deputy Commissioner of Correction on October 2, 1969, and I assume an answer to the claims of the complaint has been or will be filed shortly to put the claims in issue.

It seems from the opposing affidavit to the motion for bail the position taken for the respondents is that a hearing is necessary for decision. It is stated: "* * * and a hearing as to any issues raised by said complaint and answer will conclusively show that the plaintiff-petitioner has not been deprived of any of his civil rights under the United States Constitution, the New York State Constitution or any Federal or State statutes relative to his incarceration in any prison of the State of New York."

In view of this stated position, and also because the plaintiff-petitioner has been pressing for immediate hearing, contending to be entitled to release, a hearing is

hereby fixed to be held in the Courtroom No. 2, Federal Post Office Building, Albany, New York, on Friday, October 31, 1969, commencing at 10:00 A. M. Attorney Richard A. Kohn, 100 State Street, Albany, has commendably agreed to represent the plaintiff-petitioner, and he is hereby duly assigned as his attorney.

There is probably power in this District Court in situations of this kind to grant bail, but it is obvious the power should be sparingly exercised. A Writ of Habeas Corpus Ad Testificandum has been prepared and allowed, and will issue for the production of plaintiff-petitioner at the evidentiary hearing. The motion for bail is denied.

It is So Ordered.

Dated: October 24, 1969, Albany, N. Y.

JAMES C. FOLEY,
United States District Judge.

District Court Opinion and Order (December 23, 1969).

This typewritten pro se complaint under the Civil Rights statutes is combined with a petition for a writ of habeas corpus. It rarely occurs, but the plaintiff-petitioner forwarded to the Clerk the prescribed statutory fees for filing the complaint and petition. This form of application demonstrates again the ingenuity of state prisoners in following a pattern of a pleading that brought successful results. A similar combined application,—and I had direct contact with the case,—was filed in this Court in Daniel, and U. S. ex rel. Daniel v. McGinnis et al., in 69-CV-118, and was lawyer-prepared by the firm of Rabionwitz, Boudin & Standard, Attorneys in New York City. This same firm recently obtained a preliminary injunction from District Judge Motley, of the Southern District of New York, in Sostre v. Rockefeller et al., 68 Civ. 4058, by decision dated September 4, 1969, for an inmate of Green Haven Prison New York, involving a claim based upon 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, statutes upon which jurisdiction for this action is based. Judge Motley stated flatly the Court had jurisdiction. Applying the legal principles to be followed in preliminary injunction applications, she ruled that keeping the plaintiff Sostre in segregation for more than a year on account of disciplinary charges may be totally disproportionate to the offenses charged and thus violative of the Eighth Amendment. It was stated that the plaintiff had demonstrated clear probability of success upon a final determination of the merits. The injunction restrained the Warden from holding the plaintiff in punitive segregation and from depriving him of the rights and privileges of the general prison population until final determination was made. The trial has been held, briefing directed, and the matter is under consideration. In the meantime, I understand the preliminary injunction has been complied with and Sostre was released from segregation. Reference is made to this action and the preliminary ruling to indi-

cate again that no matter the reluctance of the past, it is now settled beyond question that claims of this kind alleging federal constitutional deprivation by State prisoners, if not frivolous on their face, are within the jurisdiction of the federal courts under the Civil Rights Act and must be entertained and determined.

This fact should be recognized and accepted, because there is an increasing volume of judicial writing and comment to this effect. It is clear, as so well stated, that we have come a long way from some earlier attitudes toward rights of prisoners. (Jackson v. Godwin, 5 Cir., 400 F.2d 529.) Our own Circuit in Wright v. McMann, 2 Cir., 387 F.2d 519, at page 522, the noted case that involved a New York prisoner confined in segregation at Clinton Prison, remarked that the older cases retain little vitality; that there is no longer any question a state prisoner may bring an action under the Civil Rights Act, citing among other cases, Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030; and that the harshest blow to the old "hands-off" doctrine was struck by Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492. It is settled too that the due process and equal protection processes of the Fourteenth Amendment follow prisoners into prison. Washington v. Lee (D.C.N.D.Ala.), 263 F.Supp. 327, 331; aff'd per curiam, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212). The Civil Rights statutes, when relied upon for federal jurisdiction, do not require the exhaustion of state judicial remedies. (Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319; D'Amico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed. 647; McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622; Monroe v. Pape, supra; Wright v. McMann, supra, 387 F.2d at p. 524).

Specifically, in this instance, although the Assistant Attorney General tries to convert the complaint into solely a habeas corpus petition that alone, of course, would entail the usual requirement for exhaustion of state remedies,

to my mind the habeas corpus petition in the combination here is merely a proper adjunct to insure full relief if the plaintiff prevails in the dominant civil rights claim. (See Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939; Jones v. Peyton (E.D.Va.), 294 F.Supp. 173; United States ex rel. Stuart v. Yeager (D.C.New Jersey), 293 F. Supp. 1079; 28 U.S.C. §1651). Cases directly in point that sustain in my judgment jurisdiction under the particular, narrow claim and issues raised thereby by this plaintiff-petitioner are: United States ex rel. Campbell v. Pate, 7 Cir., 401 F.2d 55, 57; Landman v. Peyton, 4 Cir. 370 F2d 135; Sewell v. Pegelow, 4 Cir., 291 F.2d 196).

These federal authorities are set forth not as comprehensive review of all the law on the subject. Such federal writings are referred to merely to give several examples that there is full recognition by the federal courts that the primary authority and responsibility for prison administration and discipline remains, and should remain, with the State administrative personnel, and that the federal courts are never inclined to reach out to intrude unless,—and this is an important "unless" that New York should recognize,—there is sufficient showing procedures and regulations exist that impair the constitutional rights of prisoners. (Jordan v. Fitzharris (N.D.California), 257 F.Supp. 674, 680; Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620; United States ex rel. Schuster v. Herold, 2 Cir., 410 F.2d 1071; cert. den. 396 U.S. 847, 90 S.Ct. 81, 24 L.Ed.2d 96.) This position is no more than a simple, common-sense one that is in accord with the American desire for fairness within its prison systems and such philosophy has been heralded in this day from a variety of sources. The new Chief Justice of the United States, Justice Burger, in an address to the American Bar Association, called for a comprehensive and profound examination into our penal system from beginning to end, and

among the details he thought should be examined are the standards and programs for release. (American Bar Association News, Vol. 14, p. 5). Chief Judge Lumbard in his concurring opinion in Wright, supra, 387 F.2d at page 527, referred to—and I think recommended in effect to New York—consideration of the hearing procedures and safeguards set forth in the Task Force Report on Corrections, issued in May 1967 by the President's Commission on Law Enforcement and Administration of Justice. (See also State Prisons and the Free Comunity, Judge Jiudice, New York State Bar Journal, December 1969, p. 672.)

The President of the United States a short time ago called for consideration of a ten-year program with enormous appropriations to undertake search for improvements in the federal penal system that may become models for state corrections and prison administrators. Undeniably, change is in the air and the handwriting on the wall is big and black for all to see. States are making important changes in regard to promulgation of effective, fair procedures where withholding, forfeiture and restoration of good time is involved. (Burns v. Swenson (D.C.W.D.Missouri), 288 F.Supp. 4.) To its credit, it was developed at the hearing in this action that effective March 1, 1969, the New York State Department of Correction issued "Revised Procedures Covering Disciplinary Matters". Plaintiff's Ex. 8.) Such enlightened approach is heartwarming to this District Court where increasing numbers of civil rights claims of the kind here are being filed by State prisoners.

I am a firm believer that the blemishes and mistakes in the procedures of the past are best corrected from within by adoption of fair and enlightened regulation and instructions bound to withstand attack in any court, and ultimately lead to the reduction of such alleged grievances. The Governor, the Correction Commissioner and the legal

advisors for the Commissioner of Correction and the Wardens are the ones to lead the way. The best legal advice is that which anticipates difficulty and counsels the corrective measures that will reduce the challenge. A good example is the statement in Wright, 387 F.2d at p. 528 by Judge Lumbard: "The Attorney General has advised us that whatever may be the truth as to the condition of solitary confinement in a strip cell in 1965 and 1966, such conditions do not now exist." Of course, the Wardens, it seems, must have autonomy and wide authority for on-the-spot decisions but no one would contend that Wardens or their deputies should be permitted to become a law unto themselves. I am aware there is at times a guarded, almost hostile, attitude toward federal court intrusion into certain aspects of State Prison affairs. That state of mind is unfortunate and the best way, I think, to dispel it is to advise the lay correction officers, whom I have found to be men of integrity and dedication, that new thinking in the law is prevalent and must be followed.

In this action, there is again set forth as an affirmative Second Defense: "The complaint fails to state a claim sufficient to establish the jurisdiction of this Court over the subject-matter." As I have tried to indicate, in my judgment, the defense is untenable and contrary to established law. Further, it is contended that the claim here regarding conditional release is in the same category as a parole problem. However, as so ably pointed out by the appointed attorney for the plaintiff-petitioner, there are solid and clear differences. Conditional release by express New York law is based upon computation of good behavior time and in my judgment is mandatory grant by its terms and nature if the prisoner so behaves. (See Penal Law, McKinney's Consol.Laws, c. 40, 70.30(4) (a); 70.40(1) (b); 70.40(1) (a). The assertions for the Respondents that to me bear the implication good behavior

time credit may be granted or withheld at the pleasure of the Warden and the Prison Commutation Board is answered by rulings in the New York Courts that such discretionary reductions cannot be arbitrarily withheld. (People ex rel. Stark v. Deegan (1968), 56 Misc.2d 567, 289 N.Y.S.2d 285; People ex. rel. Roy v. Murphy, 36 Misc.2d 501, 233 N.Y.S.2d 282.) New York Courts have entertained these challengers, and it may be that the doctrine of temporary abstention should be applied to veer these challenges into the State Courts where I think they belong. However, and it is a bleak outlook for this 2-Judge District Court, the trend seems to the contrary. (Wright v. McMann, supra, 387 F.2d pgs. 524-525; McNeese v. Bd. of Education, 373 U.S. 668, 673-674, 83 S.Ct. 1433, 10 L.Ed.2d 622; Zwickler v. Koota, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed. 2d 444.) Judge Friendly in a very recent writing reviewed the great expanse in the application of civil rights remedies to myriad human problems unthought of in other days (Eisen v. Eastman, 2 Cir., 421 F.2d 560, 11/28/69). Many questions remain unsettled in these actions. In this action my decision which will be adverse to the State provides a vehicle for appeal which I invite and welcome in order that at least some of the questions persistently raised by the State may be answered as correct or incorrect.

The statutes of New York that apply to the grant or withholding of good behavior time are set forth in Section 803 of the New York Correction Law, McKinney's Consol.Laws, c. 43. Such section, subdivision 1, explicitly legislates the requirement that good behavior time credit may be withheld or revoked by the prison board for "bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned." Subdivision 3 of the Section directs the Commissioner of Correction to promulgate rules and regulations in regard to these matters and subdivision 4 says the withholding, forfeiture, cancellation or restoration of such allowances

shall be final and shall not be reviewable if made in accordance wtih law. This subdivision emphasizes for me the right of the Commissioner to be the final authority in these matters if the law is followed and also unquestionably possessing the power to restore the good time as the final administrative reviewing authority. In accord with Section 235 of the Correction Law there is established a Prison Commutation Board with authority to review all cases in which good time has been forfeited by the disciplinary officer and to restore or disallow any such good time revoked. By Section 236 of the Correction Law there is the provision highly important in my judgment in this situation that directs the Board where the allowance is withheld to "x forward with their report to the Commissioner of Correction their reasons in writing for such disallowance x". This direction is contained in the Miscellaneous Rules, 60.6(a), Regulations, Def.Ex. F.

In this action a hearing has been held, a satisfactory record made and transcribed. Plaintiff was sentenced in Bronx County to an indeterminate term of one and one-half to four years on February 14, 1967. The plaintiff-petitioner testified and the Head Clerk at Clinton Prison, Dannemora, New York, was the sole witness for the Respondents. There are a number of exhibits in this record that enlighten as to the inmate and employee rules, and the disciplinary and review procedures in the New York prison system. Also several exhibits have direct bearing on the incidents in which the plaintiff was involved and indicate their follow-up and aftermath through the higher echelon of the Correction officials. The plaintiff-petitioner's attack has been narrowed to 120 days good behavior time credit that was taken from him on October 31, 1968, while he was confined in Sing Sing Prison. The separate disciplinary Action reports dated October 31, 1968 (Def.Exs. A, B) charge in one possession of five con-

traband letters written by his wife in his cell along with other materials, and in the other having six pornographic photographs of his wife in his possession received through illegal channels. The judgment written in each instance is 60 days for a total of 120 days; the brief written comment in one report is plaintiff's refusal to disclose who had arranged to get the contraband into him, the other states he was adamant in refusal to disclose the method by which pornographic materials were passed to him.

The plaintiff's version given at the trial contradicts these disciplinary reports. He testified he was never confronted with written charges or the contraband. From the beginning, and I so find, the questioning was solely in regard to how he got the uncensored letters and photographs into Sing Sing. The punishment effected seems different from the judgment report, inasmuch as the plaintiff says the decision was merely "take him to the Box". (Tr. 29-30.) After a two or three minute oral interview when the plaintiff would not talk, he was told by the Deputy Warden simply, he testified, "I am going to take 60 days for the letters and 60 days for the pictures". (Tr. 31-33.) The following day, plaintiff testified he was then transferred to Clinton Prison at Dannemora, New York, where he was immediately put in and kept in segregation from November to December. (Tr. 36.) The plaintiff testified he was brought before Warden LaVallee several times and told in effect he was an educated man, that the Warden did not like to keep him in the Box although plaintiff did not do anything wrong at Clinton, but he had to be kept there as part of a continuing investigation. (Tr. 44.) Plaintiff testified this pattern continued and when he was brought before the Commutation Board at Clinton Prison, which Warden LaVallee headed, for a review of the forfeiture of his good behavior time, he was again asked only by the Warden if he was going to talk about how letters got into

Sing Sing and when he said he had nothing to say, he was told "to get out". (Tr. 51.) The plaintiff's estimate of the time period for this reviewing board appearance was 30 seconds.

These descriptions undisputed except by the two State report Exhibits give cause for concern that approved and short cut procedures did not permit fair hearing or proper consideration to such extent that would accord with ordinary due process requirements. Of course, it is understandable that maximum security prisons must employ subtle methods at times to insure that the security is not broken by devious schemes to get around the regulations promulgated in the interest of the safety of inmates and correctional personnel. It is also appreciated that summary and swift procedures are necessary to process the day-by-day disciplinary infractions. However, I am not sure the disciplinary officer or an officer of a review board can assume legally the investigative mantle and become prosecutor, judge and jury, and in this instance really the Appellate Court of review. It may be seriously questionable whether refusal to inform can reasonably come under the category of a violation of institutional rules when there is none to such effect. A serious fault, I find, in the reports is that more severe punishment was imposed and inflicted upon the plaintiff than is indicated by the judgment descriptions in them which merely state 60 days loss of good time in each instance.

However, the chief basis for my ruling to uphold the complaint is a complete failure by the prison commutation board to forward as legislatively directed its reasons, in writing, to the Commissioner of Correction for the disallowance of the good behavior time. This board has important responsibilities delegated to it by the New York Legislature because the forfeiture of time assessed by the disciplinary court in the first instance, usually one officer,

is merely a recommendation and it is not until the inmate appears before the prison board that the time credit forfeited is actually reviewed and finally assessed in whole or in part. A most important step therefore in these safeguards, of course, is the direction in Section 236 Correction Law that the board forward their reason, in writing, to the Commissioner when a disallowance is upheld in whole or in part. In this record it is practically admitted that no reasons, in writing, were forwarded to the Commissioner, and I so find. (Tr. 18-20); (see also Pl.Ex. 9 for id.)

My conclusion is that the above omission is substantial and deprived the plaintiff-petitioner of due process and equal protection of the law. My finding are contained herein. My judgment declared hereby is that the disallowance of 120 days and cancellation of 120 days good behavior credit time is void and unlawful as violative of the provisions of the Fourteenth Amendment of the United States Constitution. The Commissioner of Correction of the State of New York, a named respondent, is hereby directed to restore the remaining period of good behavior time credit to the plaintiff. Such allowance will entitle the plaintiff to release forthwith. The release of the plaintiff, of course, will be to parole supervision as required under New York law. If such release is not accomplished within a reasonable time, the attorney for the plaintiff shall submit a writ of habeas corpus to effect such release. I hereby acknowledge my deep appreciation for the outstanding legal assistance given by Attorney Kohn to this Court at the hearing and by his competent and thorough briefing in this difficult and important matter. All exhibits I shall file with this decision with the Clerk of this Court.

Judgment shall enter in favor of the plaintiff granting the relief specifically outlined herein, and this decision is the judgment.

It is so ordered.

Decision of Court of Appeals Panel Reversing District Court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 899—September Term, 1969.

(Argued July 16, 1970 Decided March 16, 1971.)

Docket No. 34567

EUGENE RODRIGUEZ, and the UNITED STATES OF AMERICA *ex rel.* EUGENE RODRIGUEZ,

Plaintiff-Appellee,

—v.—

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLEE, Warden and Chairman of the Prison Board of Clinton State Prison; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTION,

Defendants-Appellants.

Before:

WATERMAN, MOORE and HAYS,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Northern District of New York, James T. Foley, *Chief Judge*, ordering the reinstatement of 120 days good behavior credit withdrawn from appellee while he was a prisoner in a New York State prison.

Judgment reversed.

Decision of Court of Appeals Panel Reversing District Court.

RICHARD A. KOHN, Albany, N. Y., *for Appellee.*

BRENDA SOLOFF, Asst. Attorney General (Louis J. Lefkowitz, Attorney General, Samuel A. Hirshowitz, First Asst. Attorney General, Lillian Z. Cohen, Asst. Attorney General, on the brief), *for Appellant.*

HAYS, *Circuit Judge:*

This is an appeal from an order of the United States District Court for the Northern District of New York in an action brought by a state prisoner under 28 U.S.C. § 1343 (1964) and 42 U.S.C. § 1983 (1964). After an evidentiary hearing, the district court held that the cancellation by defendants of 120 days of plaintiff's earned good behavior time,[1] was unconstitutionally imposed. The defendant Commissioner of Correction of the State of New York was ordered to restore the remaining period of good behavior time credit to plaintiff. As a consequence of this order plaintiff was released from prison on December 24, 1969, although remaining subject to the supervision of the New York Board of Parole. We reverse the judgment of the district court.

In view of the basis for our disposition, only a brief summary of the facts is necessary. Rodriguez, having been convicted in a New York state court of perjury and attempted grand larceny, was sentenced to imprisonment for an indeterminate term of from one and one-half years to four years. Under New York law, a prisoner serving an indeterminate sentence may elect to participate in a con-

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[1] Credit for such time would have reduced appellee's period of incarceration by 120 days.

ditional release program by which he may earn up to 10 days per month good behavior time credit toward the reduction of the maximum term of his sentence. Appellee chose to elect this program. Optimally a prisoner so electing may be released under the supervision of the Board of Parole, after having served but two-thirds of his maximum sentence, Correction Law § 803 (McKinney 1968), Penal Law §§ 70.30(4)(a), 70.40(1)(a) and (b) (McKinney 1967); accrued good behavior allowances so earned, however, may at any time be withdrawn in whole or part for bad behavior or for violation of institutional rules. Correction Law § 803(1) (McKinney 1968).

Appellee was charged in two separate disciplinary action reports, dated October 31, 1968, with possession in his cell of five contraband letters written by his wife, and with having six pornographic photographs of his wife in his possession received through illegal channels. The Deputy Warden adjudged that 120 days of the prisoner's earned good behavior time should be cancelled as punishment, "60 days for the letters and 60 days for the pictures." In the "Remarks" section of each judgment was a statement to the effect that appellee had refused to disclose how he had managed to get possession of the uncensored items. The district judge found that this and various other disciplinary actions meted out to Rodriguez (segregation in Sing Sing for a day and a half, segregation in Clinton Prison for several weeks) were really designed to compel these disclosures from appellee. He believed that the imposition of the penalty was a deprivation of Rodriguez' right to due process because the prison regulations prescribed no penalty for refusal to inform. He further found that the Commutation Board at Clinton Prison, which reviews all cases involving forfeiture of good time, failed to

comply with a statute directing the Board to forward its reasons for the disallowances of the good behavior time in writing to the Commissioner of Correction and he characterized this failure as the chief basis for his ruling. Correction Law § 236 (McKinney 1968). We cannot agree with the trial judge's view that questions of constitutional significance are involved.

Even if we were inclined to affirm the decision on the merits we would be compelled to reverse on the ground that appellee has failed to exhaust his state remedies.

Section 2254(b) and (c) of Title 28 U.S.C. require state prisoners who apply for federal habeas corpus to show that they have exhausted state remedies. State prisoners are increasingly resorting to the Civil Rights statutes in order to circumvent the requirements of Section 2254. The present application, since it seeks release from custody, is in fact an application for habeas corpus. "[R]elease from penal custody is not an available remedy under the Civil Rights Act." *Peinado* v. *Adult Authority*, 405 F.2d 1185, 1186 (9th Cir.), cert. denied, 395 U.S. 968 (1969). In *Johnson* v. *Walker*, 317 F.2d 418, 419-20 (5th Cir. 1963) the court said:

> "Use of the Civil Rights Statutes to secure release of persons imprisoned by State Courts would thus have the effect of repealing 28 U.S.C. § 2254; of course, such was not the intent of Congress."

The "chief basis" of the district court's order is founded on error. The provision of § 236 of the Correction Law under which the prison commutation boards forward their reasons for disallowing good behavior time in writing to the Commissioner of Correction is not constitutionally re-

quired. Moreover, a letter from Warden Deegan to Commissioner McGinnis dated November 1, 1968 (Defendant's Exhibit "C") was sufficient to satisfy the statutory requirement, since it contained all the information that would have been included in a letter from the Board to the Commissioner. In any case, even if the requirement of § 236 had federal significance, the most that appellee would be entitled to is a decree ordering the board to forward a report to the Commissioner.

Although punishment for refusing to reveal the sources of his contraband would not reflect any constitutional infirmity, it is quite clear that Rodriguez did not lose his good behavior time for refusal to inform but for possession of the contraband. After the punishment was ordered he was given an opportunity to reduce his lost good time credit by revealing the source of the contraband. This procedure, commonly used in law enforcement efforts, certainly does not violate any constitutional right.

The issue in this case is typical of the increasing number of trivial questions of internal prison discipline now being brought, in the first instance, before the federal courts. If the results were not so serious for the administration of justice of a federal court of appeals solemnly deciding on the penalty in terms of good time a state prisoner should receive for having dirty pictures in his cell (or for refusing to be a tattle tale) would be so absurd as to be laughable. But if this court entertains actions of this kind it will encourage state prisoners who have any kind of "beef" to bring such actions and the federal courts will end up sitting as prison boards of discipline in the state prisons.

The federal courts should refuse to interfere with internal state prison administration except in the most ex-

treme cases involving a shocking deprivation of fundamental rights. See, e.g., *Church* v. *Hegstrom*, 416 F.2d 449, 450-51 (2d Cir. 1969); *Wright* v. *McMann*, 387 F.2d 519, 528 (2d Cir. 1967) (concurring opinion of Lumbard, *Ch.J.*); *Sostre* v. *McGinnis*, 334 F.2d 906 (2d Cir.), cert. denied, 379 U.S. 892 (1964); *Jackson* v. *Bishop*, 404 F.2d 571, 577 (8th Cir. 1968) (Blackmun, *C.J.*). A case such as the instant one, which is totally devoid of merit, should be dismissed out of hand.

At a minimum such cases should first be filtered through the state prison administrative process and the state courts. In *Wright* v. *McMann*, Chief Judge Lumbard said:

> "We are not called upon this time to decide whether Wright would be heard upon his constitutional claims in federal court without first applying for statutory relief in a state court if the New York legislature had given to inmates of its prisons the right to apply for injunctive relief against improper treatment. I would hold that if a state made provision for such relief in its courts the federal courts should abstain for a reasonable period to allow the state courts to hear the complaint and take appropriate action. I do not agree that recent decisions of the Supreme Court mandate or were intended to mandate action by federal courts in all cases involving the treatment of prisoners in state institutions, without a suitable period of abstention where state courts are empowered to hear the case and where there is reason to believe that the state would grant relief if the complaint were well founded. The disciplining of state prisoners is so peculiarly a matter in the discretion of the state, and the possibilities that prisoners will file groundless and numerous complaints in the federal courts are so obvious, that these cases

raise 'special circumstances' that make it appropriate to treat them as an exception to the caveat or policy against abstention by federal courts."

The prisoner should be remanded to serve the sixty odd days remaining of his sentence, or, if he chooses, to make an application through state administrative or judicial processes for the relief he seeks.

WATERMAN, *Circuit Judge* (dissenting):

I respectfully dissent. I would affirm the judgment entered in the Northern District of New York.

In this action brought by a state prisoner under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, Judge James T. Foley, Chief Judge of the United States District Court for the Northern District of New York, after an evidentiary hearing in which the prisoner and the state officer defendants testified and presented exhibits, adjudged that the cancellation by defendants of 120 days of plaintiff's earned good behavior time which, if not canceled, would have reduced his period of incarceration by 120 days was unconstitutionally imposed. The district judge therefore ordered that the defendant Commissioner of Correction of the State of New York restore the remaining period of good behavior time credit to plaintiff. As a consequence of this order plaintiff, although remaining subject to the supervision of the New York State Board of Parole, was entitled to an immediate release from prison, and he was so released on Christmas Eve, 1969.

The facts are fully set forth in the able opinion filed below by Judge Foley in *Rodriguez* v. *McGinnis*, 307 F.

Supp. 627 (N.D.N.Y. 1969), and need to be but briefly reiterated for the purpose of this dissenting opinion.

On February 14, 1967, Rodriguez was sentenced in a New York State court to imprisonment for an indeterminate term of from one and one-half years to four years. According to New York law, a prisoner serving an indeterminate sentence may elect to participate in a conditional release program whereby he may earn up to 10 days per month good behavior time credit toward the reduction of the maximum term of his sentence. Optimally, under this program, a prisoner may be released, under the supervision of the Board of Parole, from prison incarceration after having served but two-thirds of his maximum sentence, Correction Law § 803, Penal Law §§ 70.30(4)(a), 70.40(1)(a) and (b), but accrued good behavior allowances so earned may at any time be withdrawn in whole or in part for bad behavior or for violation of institutional rules. Correction Law § 803(1). Appellee chose to elect the conditional release program.

On October 30, 1968, while he was imprisoned in Sing Sing, Rodriguez was charged in a "disciplinary action" report with having in his possession five uncensored, and therefore contraband, letters written to him by his wife. He was similarly charged on the following day with having in his possession six uncensored pornographic photographs. These items were taken from him and turned over to the Deputy Warden. On October 31 it was adjudged by the prisoner's interrogator, the Principal Keeper, the Deputy Warden, that 120 days of the prisoner's earned good behavior time were canceled in order to punish him, "60 days for the letters and 60 days for the pictures." The judgment entered on each of the reports set forth that appellee refused to disclose how he managed to get possession of

the uncensored items.[1] Judge Foley, upon hearing appellee's testimony, discredited the "disciplinary action" reports to the following extent, 307 F. Supp. at 631:

> The plaintiff's version given at the trial contradicts these disciplinary reports. He testified he was never confronted with written charges or the contraband. From the beginning, and I so find, the questioning was solely in regard to how he got the uncensored letters and photographs into Sing Sing.

It is clear that, as Judge Foley found, the real motive behind the continuing pattern of punishment, first the cancellation of the 120 days good behavior time earned by a year's good behavior at Sing Sing, second, the immediate incarceration in the "Box" there for a day and a half, and third, the prompt transfer to Clinton Prison following that incarceration, where the confinement in segregation lasted from entry there on November 1 until the first week in December, was not designed to punish Rodriguez for his possession of uncensored mail but rather was designed to

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[1] The pertinent notations as to the letters follow:

JUDGMENT

60 days....

Remarks: Inmate refuses to disclose who had arranged to get the contraband letters to him.

/s/ R. Treanor
Deputy Warden

letters held in Warden's office.

The pertinent notations as to the photographs follow:

JUDGMENT

60 days. Inmate was adamant in refusal to disclose method by which the pornographic photographs were passed to him.

Remarks:

Pictures held in Warden's office.

/s/ R. Treanor
Asst. Superintendent

compel him to disclose the channel through which he obtained the uncensored items, or, as the majority says, to "tattletale."

Judge Foley also found that the Commutation Board at Clinton Prison, which reviews all cases in which good time has been forfeited by a disciplinary officer, failed to obey the command of the New York statute, and did not forward in writing to the Commissioner of Correction its reasons for withholding appellee's good behavior time. Correction Law §§ 235, 236.

Based on the above, the experienced district judge expressed concern that this pattern of events may well not have comported with "ordinary due process requirements" and stated, ". . . I am not sure the disciplinary officer or an officer of a review board can assume legally the investigative mantle and become prosecutor, judge and jury, and in this instance really the Appellate Court of Review." 307 F. Supp. at 632. I share his concern.

The judge indicated, also, that "the chief basis" for his decision was the failure of the prison commutation board to forward the reasons for its action to the Commissioner and that this failure deprived appellee of due process and equal protection of the law. *Id.*

Had Judge Foley found that the prison authorities had only proceeded against Rodriguez by confronting him with a charge of violating prison rules in that he possessed uncensored items, had given him a full opportunity to answer only those charges, and then had failed to forward to the Commissioner of Correction the reasons for taking away good behavior time as punishment for the infractions, I would not consider such a statutory violation to constitute such a deprivation of due process as to warrant a federal tribunal in granting relief. However, on the facts found by Judge Foley, it is my belief that this panel has no other valid option but to conclude that the procedures ap-

pellee was subjected to in relation to the uncensored mail did not meet the minimum constitutional requirement of "fundamental fairness."

Rodriguez began his drawn out confrontations with prison officials over a simple infraction of prison rules, the possession of uncensored material. Although he was "officially" charged with that simple infraction, official attention soon focused on Rodriguez's refusal to "tattletale" and to incriminate others who might have aided him in receiving the contraband.[3] It is apparent from the severity of

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[3] Rodriguez testified as to the initial Sing Sing confrontation as follows:

> I was in the visting room. My wife was visiting me, and an officer came over and told her that the visit was terminated. She left. I was told to remain. A few minutes later, the officer took me to the Warden's office. . . . The Warden said to me "How did you get these uncensored letters into Sing Sing?"
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> * * * * *
>
> I told him I had nothing to say. He then summoned somebody else and told him "Take him to the box."

Rodriguez testified with reference to the second confrontation at Sing Sing that he was taken from the box to the Deputy Warden's office by a guard. The colloquy follows:

> He said to me, the first thing he said to me, is "Look, Gene, I know that it is a waste of time asking you anything, but I want to know how uncensored letters got into Sing Sing." I said, "I have nothing to say." He said—he then said, "If you don't tell me I am going to take sixty days for the letters and sixty days for the pictures, to run consecutively." I didn't say anything. He then said, "I can give you back this lost time, give you back all your lost time." I said, "I have nothing to say."
>
> Q. Now is that the end of the conversation with the P.K.? A. That was it.
>
> Q. And how long were you in this room, total time? A. Oh, wait, there was something else that was said. He said, "You are being transferred to Clinton." He said, "You are being transferred to Clinton, Gene, tomorrow." I said, "Thanks for telling me." Then he said, "Good luck to you." I said,

his punishment, first, the wiping away of a year's accrued credit for a year's good behavior and the resulting assessment of four months additional incarceration, and second, segregation "in the Boxes" of the two prisons for a total of more than 40 days, that the punitive measures were not inflicted for possession of uncensored letters and photographs but in order to coerce him to tattletale and to divulge information that would inculpate other residents of Sing Sing.

It would seem, then, that the failure of the commutation board to forward its reasons for its actions was merely a part of the pattern of continued procedural dereliction Judge Foley found, and, as the facts he found are not clearly erroneous, and, on the record, I am not convinced

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"Good luck to you." We shook hands and I walked out. I was there two minutes or maybe three minutes.

Upon his arrival at Clinton Prison Rodriguez testified that he was immediately taken away to the box there without any further hearing. As to the confrontations at that prison, Rodriguez testified:

> While I was in the box on three separate occasions the Warden weekly would have me brought up to his office. . . . The Warden would have me brought up to his office and he said to me—what he did was this. He said "Sit down." When I sat down he said, "Look, you are an educated man. . . ."
>
> The Court: How often did he do this/
>
> The Witness: He did it three times.
>
> The Court: All right.
>
> The Witness: He did it three consecutive weeks. He said, "Look, you are an educated man." The first time "I want to know how the unauthorized letters got into Sing Sing. I don't like to keep you in the box. You didn't do anything at Clinton but I have to as part of the continuing investigation." I said, "I have nothing to say." He said, "You are going to continue to lose good time and you are going to stay in the box." He said, "We have it narrowed down to two men anyway, so that if you tell us you will save yourself all this aggravation." So I answered him, I said, "Well, if you have it narrowed down to two men, then you don't need me."
>
> So he had me taken out.

that Judge Foley made any mistake in finding the facts as he found them, I approve the conclusion that he necessarily drew from these facts that the coercive procedures adopted by the prison authorities to obtain Rodriguez's confession did not comport with the due process the accused, then a prisoner in custody, was entitled to.

Although not raised before the court below, or considered there, appellee urges us to hold that the imposition of this punishment because he remained silent in the face of interrogation was a violation of his fifth amendment privileges against self-incrimination, citing *Spevack* v. *Klein*, 385 U.S. 511 (1967). The defendants respond by pointing out that Rodriguez at the hearing before Judge Foley admitted having the uncensored items in his possession and that his refusal to talk was not motivated by any fear of criminal prosecution for possessing the items. This is most assuredly so as to the possession of the contraband, but the prison authorities' questions were not directed at seeking a confession with respect to the contraband; no confession was necessary or needed, he was "caught with the goods." The questions were directed at discovering how the letters and photographs were smuggled past prison censors. The obvious import of the interrogation was the discovery of the identity of the "insider" or "insiders" (prison guards, etc.) who must have enabled Rodriguez to receive the uncensored items. Had Rodriguez answered the prison officials and implicated certain persons employed by the prison, he would also, of course, be implicating himself in the conspiracy to circumvent censorship and he could reasonably expect further developments to follow any disclosure he might make.[4] The ramifications

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[4] See N.Y. Penal Law § 20.00 and, for example, N.Y. Penal Law § 200.00.

of the interrogation were twofold. The information sought would not only open the door for a probable criminal charge against a prison official but also, as Rodriguez would also be a party to the official's criminal act, a possible criminal charge against Rodriguez.[4]

Rodriguez may have been motivated to remain silent solely because of a fear of retaliation by his confederate, whether a prison guard or other prison employee, or even another inmate. But the fifth amendment protection protects irrespective of the subjective motives that prompt one to be silent. If the information sought by officers may tend to incriminate one who is being questioned, he has an absolute right to remain silent. Although "[a]nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying," *Gardner* v. *Broderick*, 392 U.S. 273, 276 (1968), (citing cases), no immunity from prosecution was offered in this case to Rodriguez. Nor is it any answer to say that if Rodriguez had talked under the compulsion of the threats of segregation in the box and the loss of good time credits such compulsion would have rendered his statements or the fruits thereof "coerced" and therefore inadmissible against him in a criminal prosecution. See *Garrity* v. *State of New Jersey*, 385 U.S. 493 (1967). Absent an assurance that his statements could not be used against him, we cannot assume appellee was aware of any implicit immunity he would enjoy if criminal charges for a complicity in violation of law were brought against him. Cf. *Gardner* v. *Broderick, supra* at 278-279.

I would point out, therefore, that under the circumstances present in this case the fifth amendment privilege against

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[4] See, e.g., among several penal provisions, N.Y. Penal Law §§ 195.00, 195.05, 200.00, 200.20, 205.20.

self-incrimination was a bar to the punishment imposed—punishment which obviously was not imposed for the possession of uncensored letters and photographs but imposed solely for the purpose of compelling appellee to divulge incriminating information. However, the pertinence of the fifth amendment's protection was not brought to the attention of the trial court and I find it unnecessary to uphold the decision below by reliance upon it. With reference to the issue that it was presented to Judge Foley, his factual findings are not clearly erroneous and his conclusion drawn therefrom that appellee was deprived of due process seems to me to be incontrovertible. I would affirm.

Denial of Petition for Rehearing.

A petition for a rehearing having been filed herein by counsel for the appellee.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

LEONARD P. MOORE
PAUL R. HAYS
Circuit Judges

I would grant a rehearing on points I and III of the petition. See my March 16, 1971 dissent as a panel member, pp. 4751-4759 of 1969 Term slip sheets.

STERRY R. WATERMAN
Circuit Judge

July 19, 1971.

Michael Katzoff
Docket Entries.

(United States District Court, Northern District of New York, 70 Civil 272)

DATE	PROCEEDINGS
1970	
Aug. 6	Filed Petition for Writ of Habeas Corpus and related papers
" 6	Filed Order to Show Cause returnable Aug. 11, 1970 at 2:00 p.m. at Auburn, N.Y., order that petition and supporting papers be filed without prepayment of fees, and that service of copy of Order on defendants and Louis J. Lefkowitz, Atty Gen. by mail shall be due and sufficient service
" 6	Writ Issued & del'vd to Marshal for service
" 7	Filed Return of Marshal re service of Writ of Habeas Corpus on John T. Deegan, Warden of Auburn Prison on Aug. 7, 1970
" 11	Return of Order to Show Cause. Petitioner testified in his own behalf. Continuance to August 18, 1970 at 2:00 P.M. in Auburn (Trial)
" 18	Filed photostatic copy of Respondent's Exhibit A—Disciplinary Action 1/9/69
" "	Filed photostatic copy of Respondent's Exhibit B—Disciplinary Action 1/9/69
" "	Filed photostatic copy of Respondent's Exhibit C—Disciplinary Action 1/9/69
" "	Filed photostatic copy of Respondent's Exhibit D—Disciplinary Action 1/9/69

Michael Katsoff Docket Entries.

DATE	PROCEEDINGS
1970	
" "	Filed photostatic copy of Respondent's Exhibit E—continuation sheet of disciplinary action
" "	Filed photostatic copy of Respondent's Exhibit F—re release date
" "	Filed photostatic copy of Respondent's Exhibit G—Disciplinary Action 1/7/69
" "	Trial continued from August 11, 1970. The respondent is directed to restore 30 days good time taken from petitioner for writing in his diary. To restore 20 days good time lost due to segregation. The respondent to correct error in their record keeping which allowed petitioner 10 days not entitled to. Petitioner to be released forthwith. Two day stay to allow separation from Prison. Stay terminates at 12 noon on the 20th day of August, 1970.
" "	Order—Port, J. directing Respondent to release petitioner from Auburn State Prison, said release is stayed until not later than noon August 20, 1970 to permit the proper and necessary processing of said petitioner's release—ORDERED—Edmund Port, U.S.D.J.
" "	Judgment
" 20	Notice of Appeal
" 25	Minutes of Proceedings held August 18, 1970 at Auburn, New York
Sept. 4	Transcript of proceedings held Aug. 11, 1970 at Auburn, N.Y.

Michael Katzoff Docket Entries.

(UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, DOCKET No. 35300)

DATE	FILINGS—PROCEEDINGS
8-19-70	Filed order granting motion for a stay until 12:00 noon, 8-21-70; hearing on motion to be had at 11:00 a.m. 8-21-70; motion papers and response to be filed on or before 10:00 a.m. 8-21-70
8-21-70	Filed motion for a stay
8-21-70	Filed affidavit in support of application for a stay
8-21-70	Filed affidavit in opposition to motion for a stay
8-21-70	Filed order that application for a stay is denied; brief of respondents-appellants be filed by 8-31-70 and that the brief of petitioner-appellee be filed by 9-10, which briefs may be in tw; appeal is set for argument week of 9-14-70; in the event the Michael Katzoff refused to agree in writing as above provided, the application for a stay is granted pending the termination of the appeal as above provided
9-2-70	Filed brief, appellants with proof of service (mailed 8-28-70)
9-9-70	Filed application & order advancing the argument of appeal to 9-17-70
9-10-70	Filed record (original papers of district court)
9-14-70	Filed order granting late filing of a separate appendix for appellant

Michael Katzoff Docket Entries.

DATE	FILINGS—PROCEEDINGS
9-14-70	Filed copies appendix (Mailed 9-4-70) with proof of service
9-14-70	Filed brief, appellee with proof of service (mailed 9-10)
9-17-70	Argument heard (by: Friendly, Smith & Hays, CJJ)
10-1-70	Filed supplementary brief, appellee with proof of service
3-29-71	Judgment Reversed Hays, CJ
3-29-71	Dissenting in separate opinion, Smith, CJ
3-29-71	Filed judgment (VACATED 1-25-72)
4-12-71	Filed petition for rehearing and rehearing in banc with proof of service
7-19-71	Filed order denying petition for rehearing
7-19-71	Filed order granting reconsideration in banc, etc.; the in banc proceedings in the three cases are consolidated; if petitioners desire to file further briefs, they may do so by 8-16-71; if respondents desire to file further briefs, they may do so by 9-13-71; further oral argument will not be heard unless otherwise order (consolidated with 34567 and 35253) (Filed in 34567)
10-12-71	Filed order re in banc—judges of the court and members of the respective panels who have taken senior status will hear oral argument 11-4-71 at 2 PM Room 506; if counsel desire to file additional briefs on these subjects these should be served and filed by 11-1-71 (& in 35253, 34567) (filed in 34567)

Michael Katsoff Docket Entries.

DATE	FILINGS—PROCEEDINGS
11-1-71	Filed brief, petittion on rehearing in banc with proof of service
11-1-71	Filed brief, appellant (on rehearing) with proof of service (Filed in 34567)
11-4-71	Argument heard (by: Friendly, ChJ, Waterman, Moore, Smith, Kaufman, Hays, Feinberg, Mansfield, Mulligan, Oakes & Timbers, CJJ) (& in 35253 and 35300)
2-10-72	Issued Mandate (judgment; opinion on rehearing and order)

Affidavit of Poverty.

STATE OF NEW YORK }
COUNTY OF CAYUGA } ss.:

MICHAEL KATZOFF, being duly sworn and deposed, hereby states that:

1.) I am a citizen of the US, and am confined at the Auburn State Prison, Auburn, New York 13022.

2.) That because of my poverty, I am unable to prepay the fees for the said action or suit, and that I am a poor person.

3.) That I am unable to give security for the same, and that I own no real property.

4.) That I believe I am entitled to the redress I seek in this action.

5.) That I make this affidavit in good faith, and out of the necessity of preserving the constitutional rights effecting life and liberty.

6.) That I am seeking issuance of a writ of habeas corpus against Paul D. McGinnis, Commissioner of Corrections, and John T. Deegan, Warden, to compel them to show cause why an additional forty days of "good-time" should not be restored to me, thereby effecting my immediate release from custody. The above mentioned officials, or their subordinates, shall be made to appear before this Court, and either affirm or deny petitioners allegations, as annexed hereto, and grant the specific redress requested by the petitioner.

7.) That a "Subpoena Duces Tecum" shall be issued to Warden Deegan, or his representative, for his appearance, and for the production of petitioner's dis-

ciplinary records, and any information at his disposal pertaining to the case in point.

8.) That an order be issued to Warden Deegan, to produce petitioner Michael Katzoff, in court, and allow him to bring all legal papers, notes, law books, personal property and clothing, as shall be necessary, and to be provided with an appropriate suit of clothing to dress in, for court appearances, pursuant to Article 10-c of the Criminal Code of Procedure.

9.) That he is a poor person, after such provision defining such status: "28 U.S.C., Section 1915, Adkins v. DuPont Co., 335 US 381" and prays for the above relief as soon as humanly possible.

Respectfully submitted,

MICHAEL KATZOFF
Petitioner

Sworn to before me this
28 day of July, 1970.

N.P. CLARENCE G. STANTON
Notary Public, State of New York
Qualified in Cayuga County #1343
Commission Expires March 30, 1972

Affidavit in Support of Show Cause Order.

CIVIL

Comes now the petitioner,, Michael Katzoff, presently encarcerated at the Auburn Prison, under a sentence of 1-3 yrs. for Possession of a Weapon, sentenced by Justice Schweitzer, of the NYS Supreme Court, NY County, on June 17, 1968. Indictment No. 3999/67.

first, being duly sworn under oath, deposes and says; that I am the petitioner in the above entitled action, and seek leave to file the attached affidavit, and as such, I have prepared this Petition to Proceed in forma pauperis, and know the contents to be true, under Penalty of Perjury.

The jurisdiction of this Court is invoked pursuant to 28 USC, Section 1343(a) for enforcement of rights.

May it please this honorable Court, that petitioner herein, brings this application for writ of habeas corpus and order to show cause, under Title 28, Sect. 1651, to compel the respondents to show cause, sufficient in law, why they, or their representatives, should not be made to appear before this honorable Court, to either deny or affirm petitioner's allegations, as annexed hereto.

MICHAEL KATZOFF
(Petitioner)

Sworn to before me this
28 day of July, 1970.

CLARENCE G. STANTON
Notary Public
State of New York
Qualified in Cayuga County 1343
Commission Expires March 30, 1972.

Affidavit in Support of Show Cause Order.

No Previous Application For The Relief Sought Herein Has Been Made To Any Court.

I *Statement of facts:*

I, Michael Katzoff, was initially encarcerated on June 17, 1968, at which time I began keeping a daily diary, on the suggestion of my attorney, Mr. Benjamin Glass. I was confined to Sing Sing Prison from July 1, 1968, until August 12, 1968, when I was transferred to Clinton Prison. During the month and a half I was at Sing Sing, I was questioned by Deputy Warden Trainor, and one sergent, with regards to the diary. Both commented that "it was a good way to blow off steam, and was an excellent form of self-analysis. At Clinton, the diary was known of due to my introducing its use to my group discussion leader and Parole Officer, the latter, who was giving me individual counseling. Furthermore, as I wrote my daily entries in the yard, in full view of everyone, it was not something I was doing on the sly. Prison officials at Clinton made remarks similar to those at Sing Sing.

In the latter part of November, 1968, I was transferred to Green Haven Prison, where I continued to maintain the diary daily. When I arrived, and had my belongings unpacked, the two officers commented upon the diary, as it was now four notebooks in since they checked with a sergent, and I was then told "if these diarys mention the actual names of other inmates or prison employees, you won't be able to take it with you, when you go home." But there was no mention of there being anything wrong with maintaining the diary, or its being a violation of any departmental or institutional rule. All comments made were of a basically humorous nature, due to the accuracy in which I described the diary was written.

On January 7, more than six weeks after my arrival at Green Haven, I was informed that I was "keep-locked" pending my appearance in "P.K. court" the following day.

I was not told why I was keep-locked. (I asked several officers, and was simply told, "you'll find out tomorrow.)" As my cell was in a state of disarray, and all of my diarys were missing, I assumed this was the basis of the situation.

On Wednesday, January 8, 1969, I was brought before the Deputy Warden, Mr. Gilligan, who, after calling me a torrent of vile and obscene names, simply said "Take this Jew bastard to the Box, I'll see him when I get around to it." Ergo, I was sent to solitary confinement, without knowing why, what I was charged with or how long I would be there. I was handcuffed, and roughly pushed along the prison corridors leading to the elevator, and up to the segregation facility.

On Friday, January 10, 1969, I was brought before Mr. Gilligan again this time in a small room within the seg. facility. He again launched a verbal diatribe against me, and this time said "I'm sentencing you to solitary indefinitely, and revoke 12 days of good time from you!" I was not told what, if any, specific charges were responsible for my being put into solitary, but when I asked, I was told things like "worry about important things, like going home alive rather than in a pine box, or having a lobotomy performed due to emergency needs, etc."

I later learned that, on Friday, January, my brother came to visit me, and was denied entry, because a) I was not allowed visitors during the first 30 days, and b) he had been removed from my visitor's & correspondent's list. He saw the warden, got his explanation of my present circumstances, and then contacted my attorney, and family, regarding same.

I remained in solitary for two months, which caused an additional loss of 20 days good time. My attorney and family spoke with the Warden (Follotte) Deputy Wardens (Gilligan and Sawner) and several Dept. of Corrections Officials, in an effort to gain my release from solitary. They were, on several occasions, told the basic reason(s) why I lost the good time, and was put into segregation, and these

reasons were, specifically:

1.) Mentioned, in diary, that "Asst. Deputy Warden Sawner's a cigar-smoking S.O.B."

2.) Mentioned, in diary, that "Deputy Comm. Cain is a creep."

3.) Mentioned, in diary, the thought of asking my brother to bring in a recording device to take a visit —this was considered to be a conspiracy.

4.) Pasted my inmate's rule book into my scrapbook which was considered "destruction of State Property."

Each of the above charges cost 30 days of good time.

My attorney informed me that, according to the research he had done, my Maintaining a diary, regardless of what I write in it, could not be considered a violation of any rule, either. Departmental Or Institutional, as no rule existed which could, in any way, relate to that situation. His belief was that, when I saw the "Commutation Board", *All* of the good time lost, regarding this episode, would be returned.

I appeared before the Commutation Board on 2/11/70, and was told that 100 of the 188 days I'd lost, were returned. I wasn't allowed to speak during this appearance, and the decision had obviously been made some time prior to that time.

On 2/12 I received a carbon copy of the report that was sent to the Commissioner, regarding my "hearing". On the reverse side was the explanation for the good time loss, supposedly quoted from the original disciplinary reports, the "Diary Episode" reports now read:

1.) writing diary containing derogatory remarks about Officers and administrative Officials—90 days.

2.) Had brother bring in tape recorder that would not be detected by the Metal detector at the gate—30 days.

Apparantly, the original charges have been re-written, the charge pertaining to the rule book dropped, the "conspiracy" with my brother becomes an act already committed, and the "derogatory remarks" become vague and non-specific.

Any attempts, on my part, to obtain specific information regarding the lost time, appealing to the warden for a chance to disprove or refute the charges, etc., were met with silence. A letter I wrote to the commissioner, was never received by him apparantly because it was never mailed by the Prison Officials who worried about it's contents, and my ability to prove same.

II

The 14th Amendment, which has been held to be applicable to the State Courts, states in pertinent part, "That no state of the U.S. shall abridge the privileges and immunities of citizens of the United States, nor deprive any persons of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C., Section 1343 states: The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: [3] to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the U.S., or by an act of Congress providing equal rights of citizens, or of any persons within the jurisdiction of the United States of America.

III *Exhibits:*

1. Affidavit from Irving Anolik, Attorney-at-Law.
2. Affidavit from Mr. Hyman Kruglack.
3. Affidavit from Mrs. Elaine, Katzoff.
4. Affidavit from Mr. Paul Katzoff.

5. Carbon copy of commutation Board's report to the commissioner of corrections, dated 2-11-70.

IV *Conclusion:*

Petitioner is well aware of the so-called "discretionary powers" that are granted to Prison Administrators, necessary for maintaining security and discipline. These Powers are akin to those of a judge, who meets out justice in accordance with the severity of the case at hand. The major difference being that the judge must observe very definite minimum and maximum punishment, which are carefully spelled out in the Penal Code. The Prison Administrators, on the other hand, have no such guide-lines to follow. Ergo, these "discreationary Powers" often become dictatorial Powers, and justice becomes non-existant, or runs according to whim and/or state of mind, etc.

In the brief accompanying this writ, petitioner has outlined the numerous ways in which he was denied equal protection/treatment, of the laws, and a denial of due process, according to the laws set down by the NYS legislature and the Dept. of Corrections.

Petitioner prays this honorable Court and God almighty, for justice, and that an order to show cause be issued and a hearing be granted.

Respectfully submitted,

Michael Katsoff
In person, petitioner
136 State St., Auburn, NY 13022

Sworn to before me this
28 day of July, 1970.

NP: Clarence G. Stanton
Notary Public,
State of New York
Qualified in Cayuga County
Commission Expires March 30, 1972

"Subpoena Duces Tecum."

IN THE US DISTRICT COURT FOR THE NORTHERN DIST. OF N.Y.

To: John T. Deegan, 2nd
Paul D. McGinnis, or
their representatives.

You are hereby commanded to appear in the US District Court for the Northern District of New York, at the Federal Building, Utica, New York, on the day of , 1970 at 10:00 am in the forenoon, to testify in the case of USA ex Rel Michael Katzoff, Petitioner, vs. Paul D. McGinnis and John T. Deegan, Respondents, and bring with you:

1) the disciplinary report regarding to the charges and actions taken, as outlined herein

2) the Original Commutation Board report to the Commissioner, regarding the restoration of good time, and the deferral of Petitioner's release date, as a result thereof.

2) Any and all records pertaining to Petitioner's disciplinary actions *while at Green Haven Prison.*

This Subpoena is issued upon application of the above named Petitioner.

/s/ .....
USDJ

Order to Show Cause.

The Clerk of the court has presented to me a petition and supporting papers in the above-entitled proceeding, together with an application at proceed forma pauperis.

The petitioner alleges that "good time" has been taken from about due process of law. He alleges that if the "good time" to which he claims entitlement was credited to him, he would be conditionally released immediately.

He combines with his petition for injunctive relief an application for a writ of habeas corpus.

An affidavit submitted with the petition indicates that copies of all the papers herein have been served upon the Attorney General of the State of New York, by mail, by the petitioner through the prison authorities.

Upon the petition of Michael Katzoff, verified the 28th day of July, 1970, it is

ORDERED that the petition and supporting papers herein be filed by the Clerk without prepayment of fees; and it is further

ORDERED that Paul D. McGinnis, Commissioner of Corrections of the State of New York, John T. Deegan, Warden of Auburn State Prison, and Hon. Louis J. Lefkowitz, Attorney General of the State of New York, show cause before a Special Session of this court, appointed to be held in the United States District Courtroom in the United States Post Office Building and Court House, Auburn, New York, on the 11th day of August, 1970, at 2:00 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, why an evidentiary hearing should not be held before this court to determine the petitioner's right to the relief sought, or such other relief as may be just and proper; and it is further

Order to Show Cause.

ORDERED that service of a copy of this Order upon the said Paul D. McGinnis, Commissioner of Corrections of the State of New York, John T. Deegan, Warden of Auburn State Prison, and Louis J. Lefkowitz, Attorney General of the State of New York, by depositing the same in a securely postpaid wrapper, addressed to the said persons by United States mail, on or before August 5, 1970 shall be due and sufficient service.

EDMUND PORT
United States District Judge

Dated: August 5, 1970
Auburn, New York

Excerpts from District Court Hearing.

* * *

The Court: But this is the point of the situation, if the Court were to wait until the pleadings were framed, the whole matter would become moot.

Mr. O'Brien: He is scheduled to be released in September.

The Court: September 2, he says.

Mr. O'Brien: Yes.

The Court: Why didn't you apply for this relief back in February?

Mr. Katzoff: Well, Your Honor, approximately two and a half months ago I was visited at Auburn Prison by my attorney, and he mentioned the statement to me at that time that I was not aware of before, and the statement in essence is this, that he had spoken on several occasions, more recently than the inception of this situation, so called diary episode, with personnel of the Department of Correction in Albany. In other words, he has cases there periodically and he knows these people. He was supposedly told, and I quote, that the maintaining of a diary per se is not a violation of any departmental or institutional rule or regulation, therefore the entire incident should be ruled as moot. I was not aware of anything to this extent. (pp. 11-12)

* * *

The Court: Of course, supposing you put a man in segregation unlawfully, you are going to lose good time, put him in the day he comes in the institution and keep him there, he will never get a chance to earn his good time, will he?

Mr. O'Brien: Then he of course would have to resort to the civil rights act and get his relief in that manner. (pp. 41-42)

* * *

Excerpts from District Court Hearing.

The Court: This case presents a situation that unfortunately doesn't afford the court an opportunity to perform any lengthy study. If the plaintiff or the petitioner here is entitled to any relief, it would for the most important purposes, at least, become moot if I were to take the matter under advisement and try to give it the kind of study and analysis that either Judge Motley did in the Sostri case or Judge Foley did in Rodriguez or Kripski, or that Judge Mansfield did in the Carouthers case. Those cases were brought at such a time so that they permitted of that period of study and lengthy and scholarly opinions which will be passed on by the Court.

I think I have got to take a much more pragmatic approach here. For that reason I am going to adjourn now —recess, rather I should say, for not more than an hour. I will recess until 4:30. I have got my notes of the testimony and I would like also the exhibits, and I will make my determination and announce it on the record.

(Thereupon a recess was taken, after which the hearing was resumed.) (pp. 152-153)

• • •

District Court Opinion (August 18, 1970).

The following proceedings took place on the 18th day of August, 1970 at the United States District Court, Northern District of New York, Federal Building, Auburn, New York before Hon. Edmund Port, United States District Judge.

Appearances:

Michatel Katzoff, in person and by Lee S. Michaels, Esq., Attorney for Petitioner.

Hon. Louis J. Lefkowitz, by Timothy O'Brien, Esq. of counsel, Attorney for Paul D. McGinnis, etc. The Capitol, Albany, New York.

The Court: I am going to ask the reporter to transcribe the proceedings from this point on and they will constitute the decision of the Court, the Findings of Fact and the Conclusions of Law, and when the same are transcribed they are to be filed with the Clerk.

This is a proceeding brought by Michael Katzoff, Petitioner, against Paul D. McGinnis, Commissioner of Corrections and John T. Deegan, Warden of Auburn State Prison. I believe that since the institution of the action, or shortly before the institution of the action, the Correction Law was amended, or it was amended earlier and effective shortly before this time, changing the title of the Warden to Superintendent, and the State Prisons to Correctional Facilities, is that correct, Mr. O'Brien?

Mr. O'Brien: That's correct, Your Honor.

The Court: All right. The title of the action will be considered amended accordingly.

After hearing the testimony, the arguments of counsel and of the parties, on due consideration, the Court makes the following Findings of Fact:

1. The Petitioner is confined in the Correctional Facility at Auburn, New York, formerly known as Auburn State

Prison, in execution of a sentence of one to three years imposed by the Supreme Court of New York County on or about June 17, 1968; that at various times since then the Petitioner has been confined in Dannemora State Prison, Green Haven State Prison and Auburn State Prison in execution of the sentence. In addition, the Petitioner was confined in Sing Sing Prison.

It is the practice in the prison system of New York on the admission of an inmate, or shortly thereafter, to prepare an inmate record card, referred to as a warden's card or deputy warden's card, copies of which are kept on file in the warden's office and in the deputy warden's office. As part of that record, and in the early part of the execution of the sentence, the prison authorities determine and post on the card the maximum expiration date and the conditional release date for the particular inmate. In the case of the Petitioner, his maximum expiration date is June 14, 1971. His conditional release date was fixed as June 14, 1970. That date is the date upon which he will be entitled to conditional release under the provisions of the Penal and Correction Laws of the State of New York if he duly applies for such conditional release.

The Petitioner in this case has duly and timely applied for conditional release.

Throughout a prisoner's incarceration, in the event of disciplinary action taken against him by the institution resulting in a loss of good time, that so-called loss of good time is added to the tentative conditional release date. In the first instance, the institutional procedure provides for a determination of judgment on disciplinary action which is tentative. Those tentative judgments are subsequently reviewed by a Prison Board who makes a recommendation to the Commissioner with reference to the restoration of good time which has been tentatively taken away from the prisoner under disciplinary judgments.

The prison or institution Board, to determine the good time allowances to be made to the Petitioner, met on or about February 11, 1970 and made a report to the Commissioner of Correction, a copy of which is designated as Respondents' Exhibit F, and a copy of which was also attached to the petition herein.

During the Petitioner's incarceration on a number of occasions he was disciplined as a result of alleged infractions of prison rules. The disciplinary judgments material to this proceeding all occurred on or about January 7, 1969, or January 9, 1969, except for a judgment on or about September 1, 1968, which resulted in the loss of ten-days good time, and a judgment of March 24, 1969, which resulted in a loss of thirty days good time. The judgments resulting in the loss of good time on those two occasions is not seriously questioned. The ten-day loss of good time with reference to the offense on or about September 1, 1968 of making pass in the visiting room was admitted not to be an issue by the Petitioner in open Court. With reference to the offense of pasting a list on an already approved list of books, charged on March 24, 1969, and resulting in the loss of thirty days good time, I find that the charge was properly made, prosecuted and the loss of good time did not result from any violation of any constitutional rights of the Petitioner.

On or about January 7, 1969, the Petitioner was charged while an inmate at Green Haven Prison, the charge is contained in Respondents Exhibit G and reads as follows—"It is a report to the Warden on a form used by the prison indicated to be GHP and headed 'Disciplinary Action'."

In substance, it charges Katzoff, the Petitioner, with writing a diary containing derogatory statements about the administration of this institution, and making statements in his diary about his sexual desires towards Miss Kelly and Mrs. Pendleton, who are employed here. "It

would appear that this inmate would force his attentions on the above-named women if the opportunity would arise."

I find that that charge was made against the Petitioner, that he pleaded guilty to it and that the judgment was that he be confined in segregation, without a stated time limitation, that ninety days of good time was lost or taken away from him, and the diaries were confiscated. As a matter of credibility, the Petitioner from his appearance, gentle demeanor, background, interest, does not impress the Court. I find that there is no rule or regulation of any of the institutions of the State of New York that prevent the keeping of a diary. I find that this diary was commenced with the prisoner's first incarceration, which I believe was at Sing Sing; that portions of the diary were taken with him from Sing Sing to Dannemora, from Dannemora to Green Haven State Prison before they were confiscated.

I find that the prison officials subject all entering inmates to a careful scrutiny in addition to their persons, to the belongings with which they come. The officials at all of the institutions at which these diaries were maintained knew of the diaries prior to the time that they were confiscated and the time the Petitioner was charged with their maintenance as a violation. There is no evidence that the contents of the Petitioner's diaries was in any way publicized by him or published among the prison population. The recording in the diary on the basis of the proof in this case constituted nothing more than the recording of the thoughts of the Petitioner. The Prison Board, in considering the lost good time assessed for infractions, considered a total of 160 days plus 28 days not earned. The 28 days not earned result from the inability of a prisoner to earn good time under certain conditions, such as being sent to segregation or keep locked, I believe, as a disciplinary measure. Of the 28 days the Petitioner lost on that basis,

only 20 days is in issue in this case. The time assessed for infractions of 160 days considered by the Prison Board and on which they made their recommendations to the Commissioner include 30 days loss of time defined on the back of Exhibit F, the report to the Commissioner "Had brother bring in tape recorder that would not be detected by metal detector at gate." I am satisfied that the prison authorities in setting up that charge were referring to the charge made on January 9, 1969 against the prisoner, evidenced by Respondents' Exhibit B. That Exhibit indicates that the charge was "a conspiracy to violate visiting rules," and I am reading, "in that this inmate did conspire (as shown by his own diary) with his brother, Paul, to have brought into the visiting room a recording device and that he did instruct Paul to check with an electronics firm in New York City as to the possibility of obtaining a recording device that could not be detected by the metal detector at the front gate." The judgment on that charge as recorded on the disciplinary action report is "Brother Paul is removed from visiting and corresponding list."

I am satisfied that the error on the back of the report to the Commissioner in indicating 30 days lost time for that violation results from a misreading of the inmate's record card, also referred to as the warden's card, because the charge that I have just read occupies 2 lines on that card and the 30 days "LT" is below those 2 lines and opposite an entry headed 1-9-69 VanVlack Writ and Dep. Comm. Cain in Imp. and derog. manner. Thirty days "L.T."

The entry as interpreted in this manner is supported by the disciplinary report, Respondents' Exhibit D, which relates to the charge that I have just read and commences writing about "Dep. Comm. Cain in an imp. derog. manner" and indicates a guilty plea with a judgment of guilty and thirty days lost time. Consequently, I am satisfied that the entry relating to the brother on the back of the report to the Commissioner is an error.

There is no evidence that the diary or that portion of it relating to the derogatory remarks about Deputy Commissioner Cain in which he was called a creep in the diary, was published to any of the prison population.

Mr. O'Brien: Would you mind making a finding with respect to the fact that employees, correction officers of the prison, did however read this information?

The Court: Yes, I so find, and I will give you an opportunity when I am through to supplement the findings.

The important thing with reference to calling the Deputy Commissioner a creep, however, is that there was no reference to that in the report to the Commissioner, that is, that is where the confusion between interpreting the inmate's record card and the individual disciplinary action slips arose.

Pursuant to the judgment relating to the charge of January 7 as indicated in Respondents' Exhibit G, the Petitioner was confined to segregation for approximately two months; that as a result of the two-months confinement in segregation, the Petitioner suffered a loss of twenty days good time.

I may be repeating myself, but at the risk of doing so, the Prison Board met on or about February 11, 1970 and restored 100 days out of 188 days of good time tentatively taken away from the prisoner. They stated as their reason: "Continuous disciplinary reports. See over." I find that in considering the number of proceedings that are handled, that while the reason is terse, it is adequate to advise the Commissioner of the reason for not restoring all of the good time, or for restoring that part that was restored.

Now I think that covers the factual situation in the case. Do either counsel have any suggested amendments or additions to the proposed order or to the findings as I have just dictated them?

Mr. Michaels: No, your Honor.

Mr. O'Brien: I have no such requests to make.

The Court: All right. Now I am going to the Conclusions of Law.

The Court has jurisdiction of the action pursuant to 42 U. S. Code, Section 1982, 28 U. S. Code, Sections 1343(3), 1651 and 2241, etc.

The petition is being construed with the liberality to which a *pro se* petitioner in prison is entitled. I regard it as a petition alleging a violation of his civil rights and asking for writ of *habeas corpus* as incidental to the enforcement of any judgment to which he might be entitled if the issuance is necessary.

Due process, of course, is related to the circumstances concerning which it is applied. In the case of prisoners, recognizing the necessity of the authorities to maintain discipline, recognizing their expertise and recognizing the desirability of avoiding interference with their administration of the prison system, the degree of due process to be applied is of a minimal nature. I feel that the procedural due process under the circumstances, on the basis of the evidence I have heard was not established by the Petitioner to be insufficient.

However, regardless of the amount of due process, to which he is entitled, a minimum would require that he not be punished for acts which are not a violation of any prison rule or regulation. I am satisfied that the rules and regulations that govern the management of our penal institutions have been drawn by experts and have been drawn in sufficient detail to cover in some manner any act which would be disruptive of the good discipline, management and purposes of the institution, and when the respondents fail to point to any regulation which is violated, then the person has not been afforded due process under that charge.

In addition, the writing in a diary, unpublished, to my mind is little different than thinking thoughts, I can't con-

ceive of the thinking of any thoughts being the basis of disciplinary action on the part of the prison officials.

Assuming that there were regulations that prohibited the keeping of diaries—and I find there are none—segregation for that offense, unpublished, for 60 days would constitute under the decided cases cruel and unusual punishment. As a result, the twenty days that was lost by the Petitioner resulting from the segregation, that was taken from him in violation of his rights to due process and equal protection of the law under the Fourteenth Amendment, to punish him at all for thinking would violate his First Amendment rights.

I conclude that the charge set forth in Exhibit G resulting in 90 days lost time deprives the Petitioner of his constitutional right to equal protection of the law and due process.

I conclude that the charge concerning writing derogatory matter, in an improper and derogatory manner about Commissioner Cain, and for which 30 days lost time was taken, violates the Petitioner's constitutional rights to due process and equal protection of the law.

I conclude that the Petitioner is entitled to a judgment directing the respondent Commissioner to restore the 90 days lost time—

Mr. O'Brien: It has already been restored, Judge.

The Court: I am aware of that, to restore the 90 days—

Mr. O'Brien: May I ask the purpose of the direction:

The Court: I think it will become clear if you permit me to finish.

Mr. O'Brien: I am sorry.

(The Reporter read back the last paragraph as above recorded.)

The Court: —resulting from the charge set forth in Respondents' Exhibit G and to restore the 20 days lost time which resulted from the two months in segregation imposed

as punishment for the charge set forth in Respondents' Exhibit G and for the 30 days lost time imposed as a result of the charge contained in Respondents' Exhibit D.

The determination of the Commissioner that the respondent was entitled to the restoration of 100 days good time—

Mr. O'Brien: The Court please, it is not a determination of the Commissioner, it is a determination of the Prison Commutation Board.

The Court: Well, my understanding is that they merely recommend to the Commissioner.

Mr. O'Brien: No, they do not, the Prison Commutation Board makes the determination and merely sends in a report giving reasons to the Commissioner for such determination. It is not a recommendation.

The Court: Then I will phrase the judgment—the respondents or the officers or agents acting under their authority should be directed to correct the records to reflect the corrections in the loss of good time made in these conclusions. In doing so, it is understood that the respondents have already granted to the Petitioner the 90 days relating to the charges contained in Respondents' Exhibit G—is that your position?

Mr. O'Brien: Well, I don't go along with the Court's—what do you mean?

The Court: I mean it is your position that he shouldn't be credited with the 90 days twice?

Mr. O'Brien: My position is the Court is ruling on something here which doesn't require a ruling.

The Court: I don't want to give him credit for time that he didn't lose twice. Now, is it your position that he has already, by action of the Prison Board, received credit for the 90 days lost time?

Mr. O'Brien: Yes, your Honor, in fact in his petition he asked for a maximum of 40 days, and the Court here is ruling on 90 days, and the proof is undisputed that this

90 days that a disciplinary officer imposed, was wiped out by a Prison Commutation Board.

The Court: All right, if that is the position of the State, of the respondent, then I don't want to confuse the records or give them credit for it more than once.

Mr. Michaels: Your Honor, just so—I conferred with Mr. Katzoff, I believe we could stipulate to that.

The Court: All right, stipulate to what?

Mr. Michaels: That we are talking about the same time that has already been restored to him.

The Court: All right, if it has been restored it has been restored and that is so stipulated?

Mr. Michaels: Yes.

The Court: All right. So that it is stipulated then that the only good time in issue here is the 20 days of lost good time resulting from the confinement in segregation and the 30 days imposed—well, it wasn't 30 days imposed on the conspiracy—the 30 days imposed in relation to Deputy Commissioner Cain.

Mr. Michaels: That is the position of the relator, your Honor.

The Court: Is that correct? If there is any question about it, read the statement back.

(The Reporter read back the above statement as recorded.)

Mr. O'Brien: I believe that's right your Honor, 30 days that was imposed upon him for writing these derogatory remarks about Commissioner Cain, that was a punishment wherein 30 days lost time that he had conceivably already earned was taken away from him.

The Court: All right.

Mr. O'Brien: And since the 90 days, the other punishment so far as good time is concerned that was taken away from him, was 90 days for this other activity, combination, I believe, that having been restored, the only

other point in issue would be the 20 days that he lost as the result of being in segregation for 60 days and not being able to earn 1 day of good time for every 3 days.

The Court: So what is in issue then is the 20 days, the 90 days and the 30 days, that would be a total of 140 days, and the State's contention is that they have already credited 100 days against that?

Mr. O'Brien: And that has been stipulated to, I believe.

The Court: That has been stipulated, is that correct?

Mr. Michaels: We stipulate to the 90 days—I believe 110 came in as something else, I think the 10 days was picked up from something else.

The Court: That is the 90 and 20, it is 110.

Mr. Michaels: I don't have the Exhibit in front of me. I recall 90 and 10 having been restored, I don't remember where that 10 days was restored from.

Mr. O'Brien: That was the one making the pass, on which there is no dispute, so he got the benefit of that without asking for it.

Mr. Michaels: I agree with your Honor. I don't agree on the exact arithmetic.

The Court: I don't want any equivocation, I want to know what is stipulated so I can draw conclusions. As I understand it now, it is stipulated that the lost time in question is the 20 days of lost time resulting from the segregation, the 90 days of lost time resulting from the charges of Exhibit G and the 30 days of lost time resulting from the charges in Exhibit D, which make a total of 140 days. That 100 days have been credited, leaving 40 days at issue, is that correct?

Mr. Michaels: Yes, we agree with that.

The Court: Is that the stipulation now?

Mr. O'Brien: Well—

The Court: I am not trying to make the stipulation, I am trying to find out what it is.

Mr. O'Brien: Actually, Judge, I am afraid you get a little far afield here, because as far as the restoration, if the Court is relying on this Exhibit here, the 90 days that was restored to him on the back here includes within it the charge of writing a diary containing derogatory remarks about officers and administration officials, and not 30 days as is indicated on this specific single charge.

The Court: No, that charge has 90 days, it fits in with the item. What I am trying to do is sort these items out. The 90-day charge is a 1-7-69 charge. The disciplinary action of 1-7-69 describes that same thing, writing a diary containing derogatory statements about the administration of this institution, and so forth, and it is 90 days. Now that fits the Exhibit G and it fits the warden's card. That 90 days is no problem.

Mr. O'Brien: Of course the State's position here is that these mere notations on the back of this Exhibit here do not have the force and effect of these disciplinary reports.

The Court: That is exactly—

Mr. O'Brien: It is merely a notation made by some clerk to total up the time.

The Court: That is exactly the finding I make. I find that this is an error because it doesn't correspond with specific charges.

Mr. O'Brien: But our position is that even if it is a clerical error it isn't such an error that the Court should consider in arriving at its determination with respect to whether or not this individual has been afforded his rights under the Constitution.

The Court: I am not, except that by putting something on the back of this slip—for instance, the brother, the charge relating to the brother is recorded on the back of this Exhibit as 30 days. Now, I find as a fact that there was no such penalty imposed in relation to the brother.

In relation to the brother it says: "Judgment. Brother Paul is removed from visiting and correspondence list."

Mr. O'Brien: What the Court is doing is delving into the record-keeping practices of the New York State Department of Correction and is being very critical and is basing his determination on a typographical or record-keeping practice.

The Court: No, my determination is not based on that.

Mr. O'Brien: Not upon the question of rights.

The Court: Just the contrary.

Mr. O'Brien: It would seem the other way to me.

The Court: Just the contrary. My determination is based on the facts, not the errors, and I am not being critical. If it appears that way, I want to correct the record, because in a prison institution that has the number of proceedings that they have over here in Auburn, if they made any fewer mistakes it would be a source of wonderment, not if they made more.

Mr. O'Brien: As a matter of fact, during the course of the hearing I think your Honor also discovered that 10 days credit was given to this individual erroneously.

The Court: That's right, and I am not taking that—

Mr. O'Brien: Perhaps the Court should correct that error.

The Court: I will.

Mr. O'Brien: And impose—

The Court: I intend to.

Mr. O'Brien: All right.

The Court: I don't intend to perpetuate errors, that is just what I am trying not to do. Now what I want to know is, to get back to my original question, is that the stipulation, that what is involved here is the 90 days' penalty that goes along with Exhibit G. If you refer to the exhibits, I think it will make it easier. In other words, it is the diary charges that I am finding don't constitute a charge.

Mr. O'Brien: But it is this same charge or the punishment therefor that was forgiven *in toto*, that is why I think the Court need not make a determination.

The Court: I am going to make a determination.

Mr. O'Brien: This I don't understand.

The Court: Well, I am not concerned about that. What I am concerned about is whether or not we have got a stipulation here of any kind so that I know what we are stipulating.

Mr. O'Brien: I would be willing to stipulate that insofar as this petitioner is concerned, the only thing that he stands deprived of in respect to time that he was entitled to earn would be a period of 30 days and a period of 20 days. That is all I can see, and I would be willing to stipulate to those items. I won't stipulate that he should get them back.

The Court: No. Well, you are saying exactly what I have been saying right along, 30 and 20 is 50, not 40.

Mr. O'Brien: But you are asking me for a stipulation. I will stipulate to that, too.

The Court: All right. I will add to my findings of fact, in view of counsel's statement, counsel for the respondent, that the Prison Board restored 90 days of good time which was taken away as the result of charges contained in Exhibit G, and in addition, 10 days of good time which was taken away as a result of a charge on or about September 1, 1968 of making a pass in the visiting room, of 10 days; is that the State's contention?

Mr. O'Brien: That's correct, your Honor.

The Court: All right. Then that clears the situation up. Now I will have to—I hate to bore you with a reading of this, but in order to put it in some kind of sequence I don't know what kind of a judgment I have ordered. Now, will you read that back from where I started to make my conclusions of law?

(The Reporter read back as directed.)

The Court: All right, now change that and take that out. The colloquy should remain.

On the basis of the stipulation of respondent's counsel that the 90-days good time which was taken away from the prisoner by reason of the charges contained in Exhibit G was restored by action of the Prison Board, it will not be necessary to again restore that good time, although the judgment violated the Petitioner's rights, constitutional rights. He is entitled to a judgment directing the restoration of the 30-days lost time resulting from the charges contained in Respondents' Exhibit D for the same reasons that relate to the charges contained in Respondents' Exhibit G. He is also entitled to a judgment restoring the 20-days lost time resulting from his being in segregation for a period of 60 days pursuant to the charges contained in Respondents' Exhibit G. Accordingly, he is entitled to a judgment requiring the appropriate officials to recompute his lost or his good time and conditional release date, by giving him credit for the 20 days and the 30 days hereinabove referred to.

In determining that release date, the authorities and respondents are not to be bound by an apparent error that was made in calculating his release date as September 2, after giving him 100 days restoration of good time.

The findings of fact should include a finding that the Prison Board determined that the revised release date was September 2, 1970. This was an obvious error in computation. The revised date, according to the testimony should have been September 12.

In order to be more than fair with the prisoner, the prison authorities retained the release date as September 2, 1970, knowing that was an error, by reducing the days of lost time resulting from confinement in segregation from 28 to 18. It is not the intention of the Court to perpetuate

any errors, but to have the authorities compute a correct release date based on the credits to which the Court has found the prisoner entitled. According to the Court's computation, by restoring 20-days good time referred to and the 30-days good time referred to, the prisoner would be entitled to conditional release at once, is that correct, Mr. O'Brien? I think it is quite obvious.

Mr. O'Brien: I believe that is correct, your Honor, and even assuming that the 10 days was placed back on.

The Court: I am assuming that.

Mr. O'Brien: Yes, the conditional release date would be the first week in August.

The Court: Some time early in August, yes.

Now let me ask you, it is apparent from what I have said that a judgment should be entered directing his release, that is, on conditional release subject to the provisions of the conditional release forthwith. Now I am appreciative of the fact that you just can't—I assume there is some kind of processing that has to be done. Now, can that be completed by tomorrow?

(Discussion held off the record.)

The Court: All right then, I will find, I will adjudge that he is entitled to a judgment under which he is entitled to his release forthwith, the judgment to be stayed for not more than 2 days to give the prison officials the opportunity to go through the necessary processing.

I will prepare an order right now and have it served on you. That is what I propose doing. I wouldn't want you to act otherwise.

Now, are there any suggestions in relations to the findings or conclusions?

Mr. O'Brien: I would like to take an exception.

The Court: You are given an exception to everything I have said from the minute I opened my mouth. You have got an exception to everything I said.

I am wondering if there ought to be any corrections to anything I have said or anything that I have omitted.

Mr. O'Brien: I don't wish to prolong—I don't know whether I will get a hotel room—but I was wondering if your Honor overlooked one of these charges here with respect to conspiracy to smuggle in the tape recorder, and if your Honor would make a finding on that and say that—

The Court: I think I did.

Mr. O'Brien: I don't recall that. Did you find that that was cruel and unusual punishment?

The Court: No, I found that the charge was placed and that the judgment was that brother, Paul, is removed from the visiting and correspondence list in accordance with Respondents' Exhibit B. That was the judgment. On the back of the slip when they referred to it—that is what I was trying to get at, on the back of the report when they referred to 30 days for that violation, it was clearly an error. It doesn't jive with any of the records, but it is an understandable error because the record card is so crowded.

Mr. O'Brien: Well, I know, but with respect to your findings of fact, your Honor has found that writing scurrilous things about a Deputy Commissioner is not a violation of any rule, and may be committed, this act may be committed freely by any inmate of a State prison without the imposition of any penalty therefor, if I understand your finding.

The Court: With reference to the conspiracy to violate the visiting rules, the whole matter is moot because the only punishment imposed—

Mr. O'Brien: I am talking about the writing of scurrilous—you made a specific finding of fact that writing scurrilous remarks in the diary is the same as thinking them.

The Court: That's right.

Mr. O'Brien: And even conceding that prison employees who may see this, and whose morale may be affected by it, for instance, a correction officer may come across a diary which he might have to look into for security purposes, which was done here—

The Court: I don't think I have any such evidence. The only evidence I have got is that they did look at it.

Mr. O'Brien: I don't wish to try the case over, but—

The Court: I made the finding—now a minute ago you were talking about the recording device, that is disposed of because it was moot.

Mr. O'Brien: The bringing of the diary is moot, that was my point.

The Court: No, it isn't, because that related as well to Commissioner Cain. There was an addition of 30 days.

Mr. O'Brien: I would like to request the Court for a five-day stay to enable the respondents to apply to the Second Circuit for a stay.

The Court: I will stay it for 2 days that I have stayed it in order to permit the prison authorities—that is, today is Tuesday, it is stayed until Thursday noon to permit the prison authorities the opportunity to process the prisoner and get him on parole.

Mr. O'Brien: Would your Honor be willing to give us until Thursday noon to make application to the Second Circuit for a stay?

The Court: I don't think you need my permission, but I can't see any need for a stay. The man is going on parole, you can always pull him back.

Mr. O'Brien: Judge Motley stayed her decision.

The Court: I don't think Sostre was ready to get out. I don't think he will be ready to get out for a long time.

Mr. O'Brien: In any event we may apply to the Second Circuit?

The Court: Certainly. If a judge of the Court of Appeals feels this order should be stayed, there is nothing to

prevent you from getting a stay. As a matter of fact, I am not as sensitive as the prison authorities, you can do it and call me a few names at the same time.

Mr. O'Brien: We wouldn't do that, but I am wondering if we would have an order to go to the Second Circuit with by Thursday noon.

The Court: I don't know about that. He is on parole. Suppose it was September 2, you would let him out and he would be on parole, and if he violated it you would get him back. If the judgment is to be stayed, I think you have time enough to get it. In any event, I will treat this as an application for a stay and it is denied beyond the time granted.

Now, gentlemen, if I can impose on you for just a few minutes I will go in Chambers and dictate a judgment so that—this will be a very short judgment.

Mr. O'Brien: Like a writ of habeas corpus, I suppose.

The Court: It will be a direction and a judgment and direction so that the officials, so that the warden will have something to act on.

(Discussion held off the record.)

The Court: Here's what you can do on the exhibits. Let it appear that the attorney for the respondent and prison officials have asked for the original records. I have xeroxed copies which are a little better than the wet copies that you have. I will substitute those for the originals with the understanding that if the originals are needed in the Court of Appeals that they will be supplied, of course.

(Thereupon, a short recess was taken after which the hearing was resumed.)

The Court: Let the record show that I am handing to the Clerk for filing an original judgment signed by the Court in this matter, together with a signed copy for filing with the Clerk's office.

District Court Opinion (August 18, 1970).

The Clerk is directed to file the same. I also have copies for counsel. I want a copy for Mr. Grattan, I want a copy for the Petitioner, 3 additional copies, and I ask you to certify them and then deliver them to the parties now. That should take care of your requirements, Mr. Grattan.

I will direct the Clerk to serve a certified duplicate original copy of the decree on Mr. Grattan, certified copy on counsel for the respondents and a certified copy on the counsel for the Petitioner for the Petitioner's use.

Let the record show that the service was done in accordance with the Court's direction, and we stand adjourned to Chambers.

This is to certify that the foregoing record is a true and accurate transcript of the proceedings had at the time and place noted in the heading hereof.

MARTIN L. MILLER
Official Reporter
United States District Court
Northern District of New York

Order of August 18, 1970.

Upon all the proceedings had herein and after hearing the testimony and the arguments of the parties and their attorneys, and the court having dictated the findings of fact and conclusions of law on the record, and having directed that they be transcribed and filed with the Clerk of the Court, it is

ORDERED, ADJUDGED and DECREED that the respondents restore to the petitioner upon petitioner's records the following good time in addition to the 100 days restored by the prison board:

1. Twenty days of lost good time resulting from being placed in segregation for a period of about two months commencing on or about January 8, 1969,

2. Thirty days of lost good time resulting from charges contained in respondent's Exhibit D, dated January 9, 1969, relating to the maintenance of a diary, and it is further

ORDERED, ADJUDGED and DECREED that the respondents correct the records to indicate the conditional release date of the petitioner in accordance with the restoration of the above good time, and it is further

ORDERED, ADJUDGED and DECREED that the respondent John T. Deegan, Warden of Auburn State Prison, now designated as Superintendent of Auburn Correctional Facility be directed to release the petitioner from said institution or facility pursuant to the statutes, rulings, and regulations governing the release of an inmate on conditional release forthwith, and said release is stayed until not later

than noon August 20, 1970 to permit the proper and necessary processing of said petitioner's release.

S/ EDMUND POST
United States District Judge

Dated: August 18, 1970, Auburn, New York

"I certify that
This is a true copy
Attest 8/18/70
J. R. SCULLY
J. R. Scully
Clerk, U. S. District Court

By: .....
Deputy

[SEAL]

Decision of Court of Appeals Panel Reversing District Court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 255—September Term, 1970.

(Argued September 17, 1970 Decided March 29, 1971)

Docket No. 35300

UNITED STATES OF AMERICA, *ex rel.*
MICHAEL KATZOFF,
Petitioner-Appellee,

—v.—

PAUL D. McGINNIS, Commissioner of Corrections of the State of New York, and JOHN T. DEEGAN, Warden of the Auburn State Prison, Auburn, New York,
Respondents-Appellants.

Before:

FRIENDLY, SMITH and HAYS,
Circuit Judges.

Appeal from a decision and order of the United States District Court for the Northern District of New York, Edmund Port, *Judge*, ordering under 42 U.S.C. § 1983 (1964) the reinstatement of 50 days good behavior credit withdrawn from appellee while he was a prisoner in a New York State prison and directing his release in accordance with the laws and regulations of New York.

Reversed.

Decision of Court of Appeals Panel Reversing District Court.

HERMAN SCHWARTZ, Buffalo, New York (Lee Michaels, Auburn, New York, on the brief), *for Appellee.*

LOUIS J. LEFKOWITZ, Attorney General of the State of New York Timothy F. O'Brien, Assistant Attorney General, on the brief), *for Appellants.*

HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Northern District of New York in an action brought by a state prisoner under 42 U.S.C. § 1983 (1964). Following an evidentiary hearing, the district court found that the loss of 50 days of appellee's earned good behavior time was unconstitutionally imposed. The appellant Commissioner of Corrections of the State of New York was ordered to credit the 50 days of good behavior time to appellee and appellee was ordered released in accordance with the laws and regulations of New York. We reverse the judgment of the district court.

Appellee Katzoff was sentenced to three years imprisonment following his conviction in a New York State court for illegal possession of a dangerous weapon. Under New York Correction Law § 803 (McKinney 1968 & Supp. 1970) and Penal Law §§ 70.30(4)(2), 70.40(1)(a) and (b) by McKinney 1967), prisoners are allowed to participate in a conditional release program by which they may earn up to 10 days per month good behavior time credit toward reduction of the maximum term of their sentences. Optimally, a prisoner so electing may be released under the supervision of the Board of Parole after having served approximately two-thirds of his maximum sentence (i.e., 20 days out of every 30). Good behavior allowances, however, may be

withdrawn at any time in whole or in part for bad behavior or for violation of institutional rules. N. Y. Correction Law § 803(1) (McKinney 1968).

In January 1968 while incarcerated in Green Haven prison, Katzoff's diaries which he was keeping with the knowledge of the prison authorities were taken away from him and examined. Disciplinary charges were brought against him for describing Deputy Commissioner Cain as a "creep" and a "cigar-smoking S.O.B." and for indicating in vulgar language his desire to have sexual intercourse with two nurses at the prison. Deputy Warden Gilligan deprived Katzoff of 30 days good time for these diary entries and confined him in segregation for 57 days. Katzoff ultimately lost 50 days earned good behavior time because of the diary entries—30 days penalty for his remarks as to Deputy Commissioner Cain and 20 days by not being able to earn any good time while in segregation.

The district court ruled, after holding an evidentiary hearing, that there was no regulation against the keeping of a diary (a fact conceded by the State) and that punishment for entries in a private diary violated appellee's constitutional rights to due process, equal protection of the law, and freedom of thought. The court also found that sending appellee to segregation for writing in his diary constituted cruel and unusual punishment and ordered that the prisoner be immediately credited with 50 days earned good time. Since this restoration of good time entitled Katzoff to immediate conditional release, the court on August 18, 1970 ordered entry of a judgment directing the prisoner's release within 2 days. Appellants' application to this court for a stay was denied after appellee agreed in writing that if the district court order were modified or reversed and resulted in additional time to be served, then appellee would surrender to serve such additional time.

We find it necessary to consider the merits of appel-

lee's constitutional arguments, for we find that appellee has failed to exhaust his state remedies as required by 28 U.S.C. § 2254(b) (Supp. 1959-1967) and therefore reverse the decision of the district court.

Although the district court stated that it regarded appellee's petition as alleging a violation of his civil rights and asking for a writ of habeas corpus only as incidental to the enforcement of any judgment which might issue, we find that appellee in seeking release from custody was in essence applying for a writ of habeas corpus. There is no basis for limiting the concept of habeas corpus to attacks on custody because of defects in the original conviction as distinguished from a failure to allow release according to law. "[R]elease from a penal custody is not an available remedy under the Civil Rights Act." *Peinado* v. *Adult Authority of Department of Corrections*, 405 F.2d 1185, 1186 (9th Cir.), cert. denied, 395 U.S. 968 (1969); *Johnson* v. *Walker*, 317 F.2d 418, 419-20 (5th Cir. 1963). In our recent opinion in *Rodrigues* v. *McGinnis*, Docket No. 34567, filed March 16, 1971, containing a similar application by a prisoner, we stated that the "present application, since it seeks release from custody, is in fact an application for habeas corpus."

As an application for a writ of habeas corpus, the petition is defective because there is no allegation that appellee exhausted his state remedies in accordance with the requirements of 28 U.S.C. § 2254(b) (Supp. 1959-1967). Katzoff has made no application whatsoever to the state courts, and there is no showing that an adequate state remedy is not available. There is no reason to believe that the New York courts are not fully equipped to decide whether New York prison officials may impose the discipline in question here under New York law (Correction Law § 236 (McKinney 1968)), and the New York and Federal Constitutions. Appellee's argument that the proxim-

ity of the prisoner's release renders state processes ineffective to protect his constitutional rights assumes without justification that state courts will be less responsive to a constitutional claim than the federal courts. There is no authority for the proposition that the proximity of release relieves a prisoner of the exhaustion requirements of Section 2254(b).

Reversed.

SMITH, Circuit Judge (dissenting):

I respectfully dissent. I would not bar a civil rights action for failure to exhaust state remedies because of the exhaustion requirement of 28 U.S.C. § 2254(b). The appellant is not attempting to challenge the validity of his sentence as in *Johnson* v. *Walker*, 317 F.2d 418 (5 Cir. 1963) or *Peinado* v. *Adult Authority*, 405 F.2d 1185 (9 Cir. 1969).

The recent *in banc* opinion of this court in *Sostre* v. *McGinnis*, —— F.2d —— (2d Cir. 1971), squarely holds that where a state prisoner is deprived of statutory good time as a penalty for his conduct, at least in a case involving first amendment rights, the federal courts have the power to order that it be restored. To make the availability of this remedy turn on the fortuitousness of the prisoner's timing in filing his section 1983 claim makes no sense in terms of either logic or judicial efficiency.

A civil rights plaintiff is entitled to choose a federal forum. If relief such as restoration of good time earned has the incidental effect of entitling him to immediate release, it should not deprive him of that choice. *McNeese* v. *Board of Education*, 373 U.S. 668, 672 (1963); *Bell* v. *Hood*, 327 U.S. 678, 683 (1946); *Damico* v. *California*, 389 U.S. 416 (1967); *Hancock* v. *Avery*, 301 F. Supp. 786 (M.D. Tenn. 1969); *Edwards* v. *Schmidt*, 321 F. Supp. 68 (W.D. Wisc. 1971).

Denial of Petition for Rehearing.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Henry J. Friendly

PAUL R. HAYS
Paul R. Hays Circuit Judges

July 19, 1971.

I dissent. I would grant the petition.

J. JOSEPH SMITH
U.S.D.J.

John Kritsky
Docket Entries.

(UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF NEW YORK,

69 Civil 276)

DATE 1969	PROCEEDINGS
Aug. 11	Filed Complaint and Petition for a Writ of Habeas Corpus
Sept. 3	Filed Affidavit of Poverty
Sept. 8	Filed Memorandum-Decision and Order—Foley, D.J. granting application to proceed in forma pauperis particularly the service fees which he is unable to pay. It is So Ordered —James T. Foley, U.S.D.J.
Sept. 8	Issued Summons—1 Orig. and 6 Copies and delivered to U. S. Marshal for service
Sept. 16	Filed Notice of Motion for an Admission to Bail, Affidavit in support of Motion for Plaintiff-Petitioner in his request for bail and Affidavit of Service by Mail
Sept. 18	Filed Application for Bail
Sept. 18	Filed Memorandum-Decision and Order—Foley, D.J. returnable October 6, 1969 at Albany, N. Y. The Clerk of the Court is directed to add the motion to the motion calendar for that date. It is So Ordered—James T. Foley, U.S.D.J.
Oct. 2	Filed Summons served September 29, 1969 on John R. Caine, Deputy Commissioner of Correction for Paul D. McGinnis, Commissioner of Correction; served September 29, 1969 on Russell G. Oswald; served Sept. 30, 1969 on Frank Ryan, Head Clerk, for J. Edwin LaVallee, Warden, served September 29, 1969 on Russell C. Oswald, Chair-

John Kritsky Docket Entries.

DATE 1969	PROCEEDINGS
	man of the Board of Parole, New York State; served September 29, 1969 on John R. Caine, Deputy Commissioner, New York State Department of Correction; served September 30, 1969 on Frank Ryan, Head Clerk for J. Edwin LaValle, Chairman of the Prison Board
Oct. 6	—Filed Affidavit of Defendants-Respondents in Opposition to Motion for Bail
Oct. 6	—Filed Petition for bail etc.
Oct. 6	—Motion for Bail. Decision reserved
Oct. 16	—Filed Affidavit of Service of Affidavit on John Kritsky
Oct. 16	—Filed Answer of Defendants
Oct. 16	—Filed Affidavit of Service of Answer personally on John Kritsky
Oct. 29	—Filed Memorandum-Decision and Order—Foley, D.J. denying motion for bail. An evidentiary hearing is to be held November 14, 1969 at Albany, N. Y. at 10 A.M. Richard A. Kohn, Esq. is appointed as counsel for plaintiff-petitioner. A Writ of Habeas Corpus Ad Testificandum will issue for production of plaintiff-petitioner at the hearing. It is So Ordered—James T. Foley, U.S.D.J.
Oct. 29	—Writ issued and delivered to U. S. Marshal for service
Nov. 6	—Filed Writ of Habeas Corpus Ad Testificandum served November 4, 1969 on Harold Corcoran, Deputy Warden for J. Edwin LaVallee, Warden
Nov. 14	—Filed inquiry re motion pending application for bail (phone HPK)

John Kritsky Docket Entries.

DATE 1969	PROCEEDINGS
Nov. 17	—Trial. Return of Writ of Habeas Corpus—hearing under Civil Rights. Mr. O'Brien moves to dismiss complaint on grounds stated. Decision reserved. The Court directs that record be transcribed at cost of government. 3 weeks to file and exchange briefs after receipt of transcript—1 week to reply.
Nov. 25	—Filed Transcript of Hearing held November 14, 1969 at Albany, N. Y.
Jan. 12	—Filed Memorandum of Law on Behalf of Defendants-Respondents
Jan. 30	—Filed Memorandum on Behalf of Plaintiff
Feb. 11	—Filed Stipulation to correct stenographic errors in transcript of hearing, and letter from Judge Foley re same
Feb. 11	—Filed Order correcting Transcript of Hearing, Foley, DJ, and copy of Judge Foley's letter of Feb. 10, 1970 re same
June 15	—Filed Plaintiff's Exhibit No. 1 (State of N. Y. Department of Correction Notice of Election Under Correction Law Section)
June 15	—Filed Plaintiff's Exhibit No. 2 (Clinton Prison Interdepartmental Communication)
June 15	—Filed Plaintiff's Exhibit No. 3 (Clinton Prison Interdepartmental Communication)
June 15	—Filed Plaintiff's Exhibit No. 4 (Prison Commutation Board Conditional Releases 10/68)
June 15	—Filed Plaintiff's Exhibit No. 5 (Prison Commutation Board July 21, 1967)
June 15	—Filed Defendant's Exhibit A (Auburn Prison Disciplinary Action dated March 15, 1962)

John Kritsky Docket Entries.

DATE 1970	PROCEEDINGS
June 15	Filed Defendant's Exhibit B (Inmates' Rule Book)
June 15	Filed Defendant's Exhibit C (photostatic copy of letter dated October 10, 1968 to Hon. Paul D. McGinnis, Commissioner of Correction from J. E. LaVallee, Warden
June 15	Filed Memorandum-Decision and Order—Foley, D.J. the Commissioner of Correction is directed to restore the good behavior time credit of 590 days to plaintiff; such restoration will entitle plaintiff to release forthwith to parole supervision under his Conditional release election. If plaintiff is not released forthwith, the attorney for plaintiff shall submit a writ of habeas corpus to effect the release. All exhibits shall be filed with this decision in the Clerk's Office at Utica. Judgment shall enter granting the relief to the plaintiff particularly set forth in the above paragraph. This decision constitutes the judgment. It is So Ordered—James T. Foley, U.S.D.J.
July 2	Filed Notice of Appeal of State of New York

John Kritsky Docket Entries.

(UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT,

Docket No. 35253)

DATE	PROCEEDINGS
8- 3-70	Received record (original papers of district court)
8-11-70	Filed record (original papers of district court)
9-10-70	Filed order removing original record, appellant
9-16-70	Filed order extending time to file appellant's brief & appendix to 10-1-70
9-30-70	Filed appendix with proof of service
9-30-70	Filed brief, appellant with proof of service
10-19-70	Filed motion for assignment of counsel with proof of service
11-16-70	Filed order granting motion assigning Richard A. Kohn as counsel for appellee
12-16-70	Filed order adjourning argument of appeal to 1-4-71
1- 4-71	Filed brief, appellee
1- 4-71	Filed supplemental brief, appellee
1- 4-71	Filed volume of exhibits (4 copies)
1- 4-71	Argument heard (by: Lumbard ChJ, Moore & Smith, CJJ)
7-19-71	Filed order granting reconsideration in banc, etc.; the in banc proceedings in the three cases are consolidated; if petitioners desire to file further briefs, they may do so by 8-16-71; if respondents desire to file further briefs, they may do so by 9-13-71; no further oral argument will be heard unless otherwise ordered (Consolidated with 34567 and 35300) (Filed in 34567)

John Kritsky Docket Entries.

DATE	PROCEEDINGS
10-12-71	Filed order re in banc—judges of the court and members of the respective panels who have taken senior status will hear oral argument 11-4-71 at 2 P.M. Room 506; if counsel desire to file additional briefs on these subjects these should be served and filed by 11-1-71 (filed in 34567) (& in 35300)
11- 1-71	Filed supplementary brief, appellee with proof of service
11- 1-71	Filed brief, appellants (on rehearing) with proof of service (Filed in 34567)
11- 4-71	Argument heard (by: Friendly, ChJ, Waterman, Moore, Smith, Kaufman, Hays, Feinberg, Mansfield, Mulligan, Oakes, & Timbers, CJJ) (& in 35253 and 35300)
2-10-72	Filed itemized and verified bill of costs
2-10-72	Issued Mandate (judgment)
2-18-72	Filed statement of costs
2-18-72	Issued statement of costs
6-20-72	Original record returned to district court

Complaint and Petition.

STATE OF NEW YORK
COUNTY OF CLINTON } ss.:

JOHN KRITSKY plaintiff-petitioner (hereinafter referred to as plaintiff), respectfully alleges:

1. This action arises under the Constitution of the United States in particular Art. I Sec. 9, Cl. 2, and the Fifth, Sixth, Eighth and Fourteenth Amendments thereto and under 28 U.S.C. §§ 2241 2254 and 42 U.S.C. § 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1331, 1343(3), 2241, 2254 and 42 U.S.C. § 1983 and under Art. I, Sec. 9, Cl. 2 of the Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments thereto.

2. The matter in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000) Dollars.

3. Relief is sought herein for petitioner's release, pursuant to a Writ of Habeas Corpus from unlawful custody in violation of plaintiff's constitutional rights; for a Declaratory Judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and for preliminary and permanent injunction pursuant to 28 U.S.C. § 1651 and 42 U.S.C. § 1983.

4. Plaintiff, a natural-born citizen of the United States, was convicted of first-degree robbery on May 1, 1957, and was sentenced as a second-felony offender to an indeterminate term of from fifteen to eighteen years on June 24, 1957, in the General Sessions Court of New York County. Plaintiff has served approximately 12½ years in prison, without probation or parole, and is presently incarcerated at Clinton State Prison, Dannemora, New York.

5. The individual defendants in this proceeding are sued in their official capacity:

a. Paul D. McGinnis, New York State Commissioner of Correction, whose principal office is located in Albany, New York, is charged with the duty of directing and supervising the activities of the defendant, Department of Correction, which administers the prisons and other correctional institutions and programs of New York State, pursuant to New York Correction Law (hereinafter "Corr. L.") §§ 5, 6-a, 112 *et seq.* The Commissioner of Correction is also empowered to appoint the wardens of the various state prisons, including Clinton State Prison, who serve under his general direction. Corr. L. §§ 234, 803 authorize the Commissioner of Correction to formulate rules governing the allowance or disallowance of reductions in prison terms "for good conduct and for efficient and willing performance of duties assigned to . . . (prisoners) in prison or penitentiary (hereinafter referred to as 'good behavior time credit')."

b. J. Edwin LaVallee, Warden of Clinton State Prison, is the person having direct and immediate custody of the plaintiff. Pursuant to Corr. L. §§ 235, 803, the defendant LaVallee is charged with the duty of acting as chairman of the "Prison Board" of Clinton State Prison, which determines allowance or disallowance of good behavior time credit.

c. Russell G. Oswald, whose principal office is located in Albany, New York, is chairman of the defendant New York State Board of Parole, which is empowered to determine the qualifications of prisoners for release on parole pursuant to Corr. L. § 210 *et seq.* and to supervise prisoners who have been released on parole or under the "statutory" or "conditional release" programs established by Corr. L. §§ 220, 234, 803, Penal L. §§ 70.30, 70.40, and described in greater detail in paragraphs 6 and 7, *infra.*

6. Prior to September 1, 1967, prisoners serving indeterminate sentences in New York State Prisons were eligible to participate in the "Statutory Release" program pursuant to Corr. L. § 230, which provides that a prisoner serving an indeterminate sentence may earn up to five days per month but no more than two months per year "Good Behavior Time Credit" toward the reduction of his maximum term, thereby qualifying the prisoner for mandatory release from prison under supervision of the Board of Parole after serving five-sixths of the maximum term.

7. In 1961, the New York Legislature enacted Corr. L. § 803 and Penal L. § 70.40(b) establishing the "Conditional Release" program, under which a prisoner serving an indeterminate term could earn up to 10 days per month good behavior time credit toward the reduction of his maximum term, thereby qualifying him for mandatory release from prison under the supervision of the Board of Parole after serving two-thirds of his maximum sentence provided such prisoner elected to participate in the conditional release program and waived his rights under the statutory release program, above described.

8. Plaintiff did in fact so elect to participate in the conditional program and waived his rights under the statutory release program.

9. By virtue of the foregoing, plaintiff was therefore fully qualified for and entitled to "Conditional Release" on February 22, 1969. Plaintiff is now approximately 6 months beyond his lawful date of release.

10. The defendants LaVallee and McGinnis, in violation of plaintiff's constitutional rights to due process of law and against cruel and unusual punishment have denied cancelled and disallowed good behavior time credit toward

conditional release, amounting to 939 days, to which plaintiff is entitled, and have thereby arbitrarily and capriciously extended plaintiff's prison term to October 1, 1971.

11. The defendants LaVallee and McGinnis threatened to unlawfully and unjustly imprison and detain the plaintiff in their custody and pursuant to their order in violation of plaintiff's constitutional rights under the Fifth Six and Fourteenth Amendments in that such denial, cancellation and disallowance of good behavior time credit was illegally effected by the defendants LaVallee and McGinnis:

(i) Without affording plaintiff notice of any charges or a fair hearing at which plaintiff would have the assistance of counsel and the opportunity to confront witnesses against him and present evidence on his own behalf; and a specification of the grounds and underlying facts upon which defendants' determination was based;

(ii) Without substantial evidence or even a basis in fact to support the determination; and

(iii) Have established a discriminatory policy against the old law prisoner (those sentenced under the old penal code of New York State), of which plaintiff is ideally representative; have subjected plaintiff to repeated punishment for the same acts; have subjected plaintiff to a double-standard of punishment; have deprived plaintiff of equal protection from repeated punishment, while in contrast, the new law prisoner (those sentenced under the New Penal Code of N.Y.S., effective September 1, 1967) is protected from repeated punishment for the same acts. Such behavior is afar cry from acting in accordance with law, justice, and fairness; and

(iv) Said determination to deny, cancel and disallow good time behavior credit was arbitrary and capricious

and an abuse of discretion and was part of a program of harassment and oppression directed at the plaintiff for having participated in a peaceful and non-violent work strike which ultimately culminated in legislation being passed to grant good time on the maximum of a sentence [Corr. L. § 230(4)] for which plaintiff was sentenced to 18 months lost time. Evidently, said punishment is quite severe, in this case, beyond the mandate of statutory obedience.

12. All available and adequate state remedies have been exhausted.

13. No prior application has been made for the relief requested herein.

WHEREFORE plaintiff prays for the following relief:

1. That a judgment issue declaring the determination of the defendants LaVallee and McGinnis and their agents denying, cancelling, and disallowing 939 days good behavior time credit toward conditional release was void illegal and in violation of the Fifth, Sixth and Fourteenth Amendments for the reasons specified and set forth in Paragraph 13, *supra*.

2. Restraining the defendants LaVallee and McGinnis and their agents from denying, cancelling or disallowing good behavior time credit toward conditional release without adhering to procedural due process;

3. Issuing a Writ of Habeas Corpus requiring the defendant McGinnis to order plaintiff's conditional release from imprisonment forthwith of a corrected computation; and

4. Granting such other and further relief as this Court may deem appropriate.

Dated: August 6, 1969.

By JOHN KRITSKY—#37729
Box "B"
Dannemora, New York, 12929

STATE OF NEW YORK }
COUNTY OF CLINTON } ss.:

JOHN KRITSKY, being duly sworn deposes and says:

That he is the plaintiff-petitioner named in the foregoing petition.

That same is true to his knowledge and experience undergoing such unwarranted treatment, and punishment, as stated, and this petition is submitted in good faith, and to obtain redress of law and protection of the law thereunder.

JOHN KRITSKY
Plaintiff-Petitioner pro se

Sworn to before me this
6 day of August, 1969.
FRANCIS A. RYAN,

FRANCIS A. RYAN,
Notary Public,
Clinton Co., State of New York.
Commission Expires March 30, 1970.

Answer.

Defendants, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, for an answer to the complaint of the plaintiff herein, allege as follows:

First Defense

The complaint fails to state a claim sufficient to establish the jurisdiction of this Court over the subject matter.

Second Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

Third Defense

That any denial, cancellation or disallowance of good behavior time credit to the plaintiff by the defendants in connection with plaintiff's sentence as a second felony offender in the General Sessions Court of New York County on June 24, 1957 was not in violation of plaintiff's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution nor was the same in violation of the plaintiff's rights under the New York State Constitution nor in violation of any Federal or State statutes governing plaintiff's incarceration in any prison of the State of New York pursuant to said sentence.

Wherefore, defendants respectfully pray that the complaint herein be dismissed.

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants-Respondents
The Capitol
Albany, New York 12224

(Verified by J. Edwin LaVallee on October 14, 1969.)

Memorandum-Decision and Order of October 28, 1969.

JAMES T. FOLEY, D.J.

MEMORANDUM-DECISION AND ORDER

By memorandum-decision and order dated September 5, 1969, the plaintiff-petitioner was authorized to proceed in forma pauperis in order to have served the complaint, for which he had paid the statutory filing fee. The present motion to decide is for bail pending determination of the issue, and was made returnable by me at a regular motion day, October 6, 1969. There is an opposition affidavit to the grant of bail filed in behalf of the respondents.

The motion for bail is denied. The power is probably inherent in this Court, but is rarely exercised. (See U. S. ex rel. Epton v. Nenna, (SDNY), 281 F. Supp. 388). An evidentiary hearing which does not seem to meet with any serious opposition from the State is hereby fixed, to be held in the main courtroom, Federal Post Office Building, Albany, N. Y., on Friday, November 14, 1969, at 10:00 A. M. Attorney Richard A. Kohn, 100 State Street, Albany, N. Y., at my request, has agreed to represent the plaintiff-petitioner, and is now assigned as his counsel. A Writ of Habeas Corpus Ad Testificandum has been prepared and allowed and will issue for production of plaintiff-petitioner at the hearing.

It is So Ordered.

Dated: October 28, 1969

JAMES T. FOLEY,
United States District Judge.

District Court Opinion and Order (June 12, 1970).

JAMES T. FOLEY, Chief Judge.

The plaintiff filed a handwritten complaint based upo the civil rights statutes and petition for habeas corpus i the same combined form with similar issues as filed i Rodriguez v. McGinnis (N.D.N.Y.—December, 1969) 30 F. Supp. 627, that after trial I ruled upon in favor o Rodriguez. He paid the $15.00 filing fee and thereafter I granted leave to prosecute his action in forma pauperis Attorney Richard A. Kohn, who appeared for Rodrigues agreed to act as counsel for plaintiff, for which assistanc the Court is again grateful inasmuch as there is no provi sion for compensation of any kind or reimbursement for expenses. Attorney Kohn represented the plaintiff at the hearing held and submitted a substantial brief in his behalf on the law and facts after the transcript was available Transcription of the minutes of the hearing understand ably took some time and caused delay in the briefing. Two court reporters in this busy two Judge Court, where we have the flow also of other purely federal and important private and government civil and criminal cases as other District Courts do, place substantial burdens upon them in the coverage of our large geographical area to the same extent as it does upon the Judges deluged with state prisoner applications of every kind. Pressures of other work that I thought should be given priority prevented on my part the speedy disposition we try to give State prisoner applications where immediate liberty may be at stake. However, the filing in this Court of a substantial number of civil rights complaints for every grievance imaginable by New York State prisoners in recent years has slowed considerably the disposition within the desired reasonable time. However, in my judgment, the other numerous and substantial cases filed in this District Court in behalf of important private and governmental interests have the right to be processed, heard and decided also with reason-

ble dispatch. I reaffirm my statements in Rodriguez that it is my firm belief it would best serve the interest of justice and all concerned and be sensible if a little abstention were authorized when proper in the federal courts to allow a fully manned and recognized competent State Court system to hear these civil rights claims that primarily involve State interests, problems and concerns (See Wright v. McMann, 387 F.2d 519, at 528, Chief Judge Lumbard concurring).

A satisfactory hearing in this claim was held and references herein shall be to the transcript of it. In the complaint, the plaintiff requests a judgment declaring the disallowance of 939 days good behavior time toward the conditional release he elected formally for under certain New York statutory provisions was adjudged in such manner to be violative of constitutional rights of due process and imposing cruel and unusual punishment. (Pl.Ex. 1, §§230-a, 803(1), N.Y. Correction law (McKinney's Consol. Laws, c. 43, 1968 ed.); New York Penal Law, 70.30(4) (a); 70.40(1), (b), (McKinney's Consol.Laws, c. 40, 1967 ed.).

The position of the Assistant Attorney General in behalf of the defendants is the same as that taken and offered in Rodriguez, supra. The contentions (1) there is not jurisdiction under 28 U.S.C. §1343(3), as so invoked to entertain the civil rights claim authorized by 42 U.S.C. §1983, (2) that conditional release is in the same category as parole, being a matter of grace to be withheld at will, are answered in my Rodriguez writing in relation thereto and are adhered to by reference herein. (See also the difference between parole and conditional release—Task Force Report on Correction, issued by the President's Commission on Law Enforcement and Administration of Justice, p. 86). In Rodriguez, I pointed out that New York rulings expressly held that discretionary reductions for good behavior time cannot be arbitrarily withheld. (People ex rel. Stark v. Deegan (1968) 56 Misc.2d 567, 289 N.Y.S.2d 285;

People ex rel. Roy v. Murphy (1962) 36 Misc.2d 501, pp. 503-504, 233 N.Y.S.2d 382). Inasmuch as New York seems adamant in arguing need for exhaustion of state remedies and lack of jurisdiction in a problem of this kind concerning loss of good time allegedly disallowed unconstitutionally, appeal is invited again to be expedited that may settle once and for all these questions that by now must be ripe for federal appellate review and rulings. Such appellate guidance will be of great assistance to this District Court in the planning and management of its calendars. (See Sostre v. Rockefeller et al., 312 F.Supp. 863, (S.D.N.Y.-68 Civ. 4058—Motley, J.) decided May 14, 1970).

The challenge of the petitioner who was produced in Albany on a writ of habeas corpus from Clinton Prison, two hundred miles away, was reduced before the hearing after conference with his attorney from 939 days disallowed to 590 days. This good time disallowance was thus narrowed to a single episode, unquestionably a serious one, that occurred in Auburn State Prison during March 1962. Two witnesses testified at the hearing, the plaintiff, who in my judgment was as articulate a witness who could be heard and who gave his version of the serious incident in which he was admittedly involved, and that led to the judgment of the Principal Keeper set forth in Plaintiff Ex. A in this brief fashion: "To Segreg.—1½ years Lost Time." The lost time, or good behavior time credits taken for a year and one-half are computed to be 545 days, and the length of his segregation from March 14 to April 10, 1962 at Auburn and April 10 to July 28, 1962 at Clinton Prison, Dannemora, is the basis for the additional 45 days good time loss in issue. No good time by prison rule is earned while confined in segregation. (Def. Ex. B—Inmate's Rule Book, pp. 4-5). The only other witness, who testified was Francis Ryan, called by the plaintiff, Head Correctional Clerk at Clinton Prison who explained the law and rules and procedures applicable and the internal

administrative methods followed by the so-called Prison Commutation Board to comply with the statutory review provision when good time forfeiture is reviewed and not restored (Tr. 75 et seq., §§ 234, 235, 236, N.Y.Corr. Law; 7 N.Y. C.R.R. (Correction—Codes, Rules & Regulation, §60.4(e). Ryan with a long experience in Prison administration evidenced familiarity with all the procedures and at times as he testified sat when necessary as a member of the Commutation Board and was able to tell the full details of the way it actually operates and arrives at decision. (See particularly Tr. 96-105.)

The Plaintiff Kritsky was convicted in the former Court of General Sessions of New York County of Robbery First Degree on May 1, 1957. He was sentenced to an indeterminate term of 15-18 years. At the time of sentence, he was about 22 years of age and has been now more than 13 years in prison confinement.

The serious incident referred to previously was described by Kritsky in his testimony that stands in every respect uncontradicted in this record by other testimony concerning the circumstances of its happening. It seems that in 1962 the prisoners at Auburn in a protest move that Kritsky said occurred throughout the entire State prison system in an effort to persuade the New York legislature to grant by legislation ten days off the maximum sentence that would enable some prisoners to gain earlier release. (Tr. 28-29). Apparently, this protest later bore fruit and such legislation came into being (See also People ex rel. Clemente v. Warden (1961) 9 N.Y.2d 216, 213 N.Y.S.2d 55, 173 N.E.2d 784). Kritsky characterized the conduct of the prisoners as peaceful and said it consisted only of the prisoners entering and staying in their cells and refusing to come out to go to their work or other type assignments in the daily prison routine. The protest by their action lasted about one and a half days. The prisoners were warned that if they did not come out of their cells by a certain time they would lose one year good time and Kritsky said about

7/8 at Auburn did come out after this warning (Tr. 30). Kritsky came out about an hour later than the deadline, and the next morning went to his work as a clerk in a prison office. However, he testified he noticed many of his friends no longer there, so he went back that afternoon to his cell again contrary to what he was supposed to do. He was taken from the cell five to fifteen minutes later, and was taken to segregation where he was kept for a week to ten days before he came before the Principal Keeper for hearing. Again, I do not intend to minimize the seriousness of this entire affair, no matter how laudable the purposes, because it is evident prison discipline and order could be in great peril if protest movements, so commonplace and at times upsetting to some in these days, were to be given free rein in prison systems where firmness and application of quick and adequate discipline is clearly as essential to safeguard the security of a large prison and circumvent the start or spread of possible riot and rebellion. No court would want to interfere with these delicate judgments.

However, as grave an intrusion as I think all these are, particularly when made by a federal court into administration of State prisons that do not really entail the cruelty or inhumaneness that shocks everyone, I find that the due process of rights of the plaintiff were violated in the type hearing given plaintiff in 1962. The hearing was held a week or ten days after the protest in a room off the segregation area where plaintiff had been confined with only the Principal Keeper, as the disciplinary authority and judge. The plaintiff's testimony is graphic description:

> "A He (Principal Keeper) advised me that I had been charged with advocating insurrection and a revolution and advocating incendiarism in the prison. He said, 'How do you plead?' I said, 'Not guilty.' He said, 'Eighteen months lost time.'
>
> I attempted to speak—

> The Court: Wait a minute. He said, 'How do you plead?'
> The Witness: I said, 'Not guilty.'
> The Court: All right.
> The Witness: I attempted to speak and he interrupted and said, 'That will be all.' And I replied, 'In other words, I am being summarily dismissed.' He said, 'Yes.' "

In my judgment, this hearing, and I accept it as truthfully described by the plaintiff, falls far short of the fundamental fairness expected of due process requirements, no matter the need for summary disposition.

Defendant's Exhibit A, measuring by ruler about 5¼" by 8", is entitled "Disciplinary Action." It contains in most abbreviated form the charges against plaintiff, the substantial judgment rendered against him, and remarks of the disciplinary hearing officer, the Principal Keeper. The remarks without a single reference or elaboration of any kind to person or record concludes "Advocated bloodshed and burning place." There is only a dash in a large space before the word guilty which is difficult to accept as a valid admission of guilt by reason of record regularity in view of the flat contradiction by the plaintiff.

Due process is an elusive concept but there is settled satisfactory guides to discern its absence or presence. What is due process depends on the circumstances and it varies with the subject matter and necessities of the situation. (Moyer v. Peabody (Holmes, J.) 212 U.S. 78, 84, 29 S.Ct. 235, 53 L.Ed. 410). A hearing to accord with due process must be given at a meaningful time and in a meaningful manner. (Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct., 1187, 14 L.Ed.2d 62). Under the concepts of the present day, it has been stated the decision maker should state reasons for the determination, indicate the evidence relied upon, and an impartial decision maker is essential. (Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011,

25 L.Ed.2d 287, 3/23/70). The right to be heard before being condemned to suffer grievous loss of any kind is a principle basic to our society. (Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 95 L.Ed. 817). Applying these principles, I am constrained to rule there was a lack of due process that resulted in grievous loss to plaintiff by reason of continued confinement.

By this ruling, I do agree that in these prison disciplinary procedures there is no need for a full panoply of judicial due process which was the language and recommendation contained in the Task Force Report on Corrections, issued by the President's Commission on Law Enforcement and Administration of Justice, at p. 13. I would think sufficient and fair the four requisites outlined by Judge Wyzanski in Nolan v. Scafati (D.C.Mass.) 306 F.Supp. 1, 3, for proper procedure before prisoner such as plaintiff is subjected to a serious penalty. (See also Landman v. Peyton (4 Cir. 1966) 370 F.2d 135). The ruling herein is also not to be construed as one to the effect that unrestricted and absolute right to free speech should be accorded prison inmates. (See Whitney v. California (1927) 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095; Roberts v. Pepersack (D.C. Maryland 1966) 256 F.Supp. 415, 428). Prison discipline is essential and certain rights have to be curtailed in order to achieve it. (United States ex rel. Wakeley v. Pennsylvania (D.C.E.D.Pa. 1965) 247 F.Supp. 7).

I also find as in Rodriguez a failure to comply with the statute of New York that directs the prison commutation board to forward its reason in writing to the Commissioner of Correction for disallowance of good behavior time (N.Y. Correction Law, Section 236). There was a letter from the Warden, to the Commissioner, Def.Ex. C, derogatory to the conduct of plaintiff but it was conceded that this letter was not being offered as strict compliance with Section 236, but was sent for another purpose. (Tr. 102). In my judgment, the record in this case shows the importance this

report of reasons might have in relation to the review by Commissioner of the disallowance by the Commutation Board. There is a progress report made by Correction Officer Burke that evaluates the conduct of the plaintiff and his willingness to work attitude in the most praiseworthy terms. (Tr. 107, 108.) Some of the terms are that plaintiff is courteous, cooperative, well behaved with good attitude toward society and authority, who does not need extra supervision and was a very exceptional worker. The appraisal directly contradicts the one contained in the letter of the Warden. Unfortunately, it is established that the Prison Commutation Board ordinarily would not have this progress report of a guard who was in the closest of contact with plaintiff.

My findings of fact are set forth above. My conclusion is that the plaintiff in the imposition of the lost time punishment and segregation was not accorded due process. My judgment declared hereby is that the disallowance of 590 days good behavior time resulting therefrom is void and unlawful as violative of the provisions of the Fourteenth Amendment of the United States Constitution. The Commissioner of Correction, a named defendant, is directed hereby to restore the good behavior time credit to plaintiff; such restoration will entitle plaintiff to release forthwith to parole supervision under his Conditional release election. If plaintiff is not released forthwith, the attorney for plaintiff shall submit a writ of habeas corpus to effect the release. All exhibits shall be filed with this decision in the Clerk's office at Utica.

Judgment shall enter granting the relief to the plaintiff particularly set forth in the above paragraph. This decision constitutes the judgment.

It is so ordered.

Order to *In Banc* (July 19, 1971).

Petitions for rehearing in the first two mentioned cases were denied by the respective panels, with Judge Waterman dissenting in the *Rodrigues* case and Judge Smith dissenting in the *Katzoff* case. Upon suggestions of the petitioners and at the request of these judges, a poll of the judges in active service was taken and a majority voted for reconsideration in banc.

A majority of the judges in active service has also voted for initial consideration in banc of the third case above-mentioned, which involves a similar issue.

In banc proceedings in the three cases are consolidated. If petitioners desire to file further briefs, they may do so on or before August 16, 1971. If respondents desire to file further briefs, they may do so on or before September 13, 1971. The in banc court will consist of the judges in active service on the date of decision along with members of the respective panels who have taken senior status. Further oral argument will not be heard unless otherwise ordered.

HENRY J. FRIENDLY
Chief Judge

July 19, 1971.

In Banc Opinions and Order (January 25, 1972).

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

No. 889—September Term, 1969; Nos. 255 and 336—September Term, 1970; Nos. 354, 355 and 356—September Term, 1971.

(Argued to the *in banc* court November 4, 1971
decided January 25, 1972.)

Docket Nos. 34567, 35300 and 35253

EUGENE RODRIGUEZ, and the UNITED STATES OF AMERICA *ex rel.* EUGENE RODRIGUEZ,

Petitioner-Appellee,

v.

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLE, Warden and Chairman of the Prison Board of Clinton State Prison; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTION,

Respondents-Appellants.

UNITED STATES *ex rel.* MICHAEL KATZOFF,

Petitioner-Appellee,

v.

PAUL D. MCGINNIS, Commissioner of Correction of the State of New York and JOHN T. DEEGAN, Warden of Auburn State Prison, Auburn, New York,

Respondents-Appellants.

In Banc Opinion and Order (January 25, 1972).

JOHN KRITSKY, and UNITED STATES OF AMERICA *ex rel.* JOHN KRITSKY,

Petitioner-Appellee,

v.

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLE, Warden of Clinton State Prison, NEW YORK STATE BOARD OF PAROLE and NEW YORK STATE DEPARTMENT OF CORRECTION.

Respondents-Appellants.

Before:

FRIENDLY, *Chief Judge,*
LUMBARD, WATERMAN, MOORE, SMITH,
KAUFMAN, HAYS, FEINBERG, MANSFIELD,
MULLIGAN, OAKES and TIMBERS,

Circuit Judges.

The District Court for the Northern District of New York having, by order dated December 23, 1969, directed the release of petitioner Eugene Rodriguez, on the ground that he was unconstitutionally deprived of good behavior time credit, in an opinion reported at 307 F. Supp. 623, and a panel of this court by decision dated March 16, 1971, slip opinions 4745, September Term 1969, having reversed said order by a divided vote;

The District Court for the Northern District of New York having, by order dated August 18, 1970, directed the release of petitioner Michael Katzoff, on the ground that he was unconstitutionally deprived of good behavior time credit, and this court by decision dated March 29, 1971, 441 F.2d 558, having reversed said order by a divided vote;

In Banc Opinion and Order (January 25, 1972).

The District Court for the Northern District of New York having by order dated June 12, 1970, directed the release of petitioner John Kritsky, on the ground that he was unconstitutionally deprived of good behavior time credit, and this court having heard but not decided the State's appeal therefrom;

This court, by order dated July 19, 1971, having directed that the appeals in such cases be reheard *in banc*, the three appeals being consolidated for argument since they presented the same legal issue, before an *in banc* court which would consist of the judges who should be in active service on the date of decisions along with members of the respective panels who had taken senior status, and the court having received further briefs and heard oral argument, it is

Ordered that the said judgments of the District Court for the Northern District of New York be and they hereby are affirmed upon consideration of the merits and upon the authority of *Wilwording* v. *Swenson*, No. 70-5308, decided by the Supreme Court of the United States on December 14, 1971.

/s/ HENRY J. FRIENDLY.
Henry J. Friendly, *Chief Judge*

January 25, 1972.

FRIENDLY, *Chief Judge*, with whom MULLIGAN, *Circuit Judge*, joins concurring:

Although I had previously voted for reversal in these cases, it seemed to me that once *Wilwording* v. *Swenson* was decided by the Supreme Court on December 14, 1971, 40 U.S.L.W. 3277, the proper course for the *in banc* court was to affirm the orders of the district court without writing opinions, and to leave it to the State of New York to assert possible distinctions by petitions for certiorari.

Now that several of my brothers have chosen to dissent in an opinion, I feel obliged to explain my own position.

I agree with Judge Lumbard that petitions of state prisoners complaining of the time or conditions of their confinement have the same potentialities for exacerbating federal-state relations as petitions attacking the validity of their confinement—perhaps even more. That federal concern on this score is not limited to challenges to the validity of convictions is evidenced by cases such as *Ex parte Royall*, 117 U.S. 241, 251 (1886), from which the exhaustion requirement sprang, and *Dye* v. *Johnson*, 338 U.S. 864 (1949), *reversing per curiam*, 175 F.2d 250 (3 Cir. 1949). On the other hand, I cannot accept the conclusion that if such petitions are properly viewed as invoking 42 U.S.C. § 1983, a federal court can require exhaustion of state judicial remedies, if these are available. This is not simply because of the Supreme Court pronouncements which except for the summary dispositions in *Houghton* v. *Shafer*, 392 U.S. 639 (1968) and in *Wilwording* v. *Swenson*, were not in state prisoner cases, but because abstention would mean abdication in any case where the state afforded a fair hearing, whether the proper constitutional standards were applied or not. See *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1963); *Lackawanna Police Benevolent Ass'n* v. *Balen*, 446 F.2d 52 (2 Cir. 1971), and cases there cited.

The right answer, it seems to me, is that, under the broad scope the Supreme Court has given to the "Great Writ" as enacted by the Act of 1867, 14 Stat. 385, all state prisoner petitions complaining of the length or manner of custody, however phrased, are in fact petitions for habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court . . . on the ground that he is in custody in violation of the Constitution or laws of the United States." *Jones* v. *Cunningham*, 371 U.S. 236, 243

(1963); *Walker* v. *Wainwright*, 390 U.S. 335 (1968); *Peyton* v. *Rowe*, 391 U.S. 54 (1968); *Johnson* v. *Avery*, 393 U.S. 483 (1969). If they are, 28 U.S.C. § 2254(b) forbids a federal court from proceeding in the first instance "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner"—an exception sufficiently broad to enable a federal court to look at what the state courts actually do. Because of the inapplicability of *res judicata* in *habeas corpus*, recognition that such petitions are for that remedy also means that an aggrieved prisoner who has not received satisfaction at the hands of a state court can return to the federal court for a "final federal say" concerning the appropriate legal standard, although the federal court will be bound by proper state factual findings. I recognize that a number of cases, including *Houghton* v. *Shafer*, *supra*, and *Jackson* v. *Bishop*, 404 F.2d 571 (8 Cir. 1968), cited by the Court in *Wilwording*, have assumed that state prisoner complaints over the conditions of custody come under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) rather than under 28 U.S.C. § 2254. But the issue was not there raised, and the problem of such prisoner applications had not yet reached its present dimensions.

If this is the correct analysis, I do not understand how a state prisoner who is entitled to relief by *habeas corpus* under 28 U.S.C. § 2254 can opt out of that section, with its attendant requirement of exhaustion of state remedies when these are available, simply by styling his petition as one under the Civil Rights Act. But *Wilwording* seems to indicate that he can. For that reason I am constrained to concur in affirming the orders of the district court.

WATERMAN, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of my brothers Smith, Kaufman, Feinberg and Oakes. And see my statement filed in *Rodrigues* v. *McGinnis et al.* (2 Cir. March 16, 1971).

SMITH, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of my brothers Kaufman, Feinberg and Oakes. As indicated in my dissent to the panel opinion in *Katzoff*, 441 F.2d 558, 560, I would not hold that either abstention in deference to the state courts or exhaustion under the requirements of 28 U.S.C. § 2254(b) in *habeas corpus* actions may bar a prisoner from his choice of a federal forum in a civil rights action. I had thought that this was reasonably plain from *McNeese* v. *Board of Education*, 373 U.S. 668, 672 (1963), *Damico* v. *California*, 389 U.S. 416 (1967), *Houghton* v. *Shafer*, 392 U.S. 639 (1968), and our own course in *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971). *Wilwording* v. *Swenson*, —— U.S. ——, Dec. 14, 1971, bolsters that view.

Moreover, I question the desirability of even attempting to lighten our burden by stifling or delaying prisoners' complaints of unconstitutional abuse. It may be an onerous burden, especially in the districts where large state prisons are located. Many petitions are poorly prepared confusing and mendacious. They do take the time of busy courts. But these cases now before us demonstrate that among them are some of substance, a circumstance which makes the effort worthwhile. It would be far better to provide more assistance in the districts which contain Attica and the other large institutions giving rise to these

issues than to deny redress within the federal court system for deprivation of civil rights.

KAUFMAN, *Circuit Judge* (concurring):

The question which was presented to this court *in banc* is whether a state prisoner must exhaust state judicial remedies before he can bring an action for equitable relief under 42 U.S.C. § 1983, where his complaint charges that state prison officials have deprived him of fundamental personal rights. My unwavering answer to that question was that exhaustion is not required. Moreover, I agreed with Chief Judge Friendly that it was appropriate to dispose of these cases without opinions because of the Supreme Court's clear and unconditional holding in *Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (Dec. 14, 1971). Since my brothers have chosen to file opinions explaining their positions, I believe it is necessary for me to state the reasons for the views I held.

In *Wilwording* the Supreme Court instructed that: "State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." This pronouncement was based on its decisions beginning with *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), where the Supreme Court held that the federal remedy provided by § 1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *See also McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Damico* v. *California*, 389 U.S. 416 (1967); *Houghton* v. *Shafer*, 392 U.S. 639 (1968). I note also that *Wilwording* emphasized that the result in no way depended upon the inadequacy of state remedies. Quoting from *Houghton* v. *Shafer*, *id.* at 640, it added: "in any event, resort to these remedies is unnecessary.'"

I believe, however, that I should state candidly that I did not construe *Wilwording* as a ground breaking decision. The opinion instead indicates the Court's clear deference to the doctrine of *stare decisis*. *See Monroe* v. *Pape*, 365 U.S. at 192 (Harlan, *J.*, concurring). And it was our adherence to the principles gleaned from the earlier Supreme Court decisions that led us to conclude in our recent *in banc* decision in *Sostre* v. *McGinnis*, 442 F.2d 178, 182 2d Cir. 1971), that exhaustion of state legal or equitable remedies is not a prerequisite for a state prisoner to maintain a § 1983 action.

I do not intend to argue with statistics indicating that prisoner petitions are on the rise; nor shall I pretend that this condition is pleasing to Judges. But I cannot believe that federal jurisdiction in cases involving prisoner rights is any more offensive to the state than federal jurisdiction in the areas of police procedures for search, arrest and detention, *Monroe* v. *Pape*, *supra*, or education, *McNeese* v. *Board of Education*, *supra*, or welfare, *Damico* v. *California*, *supra*, or public housing, *Holmes* v. *New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968). I can think of no reason why the question of prison administration should be classified as one of greater or more peculiar state concern than the instances to which I have just referred. In any event, neither of the grounds articulated is a tolerable basis for declining jurisdiction where a prisoner specifically alleges facts indicating a callous disregard of his basic human and constitutional rights, *see Haines* v. *Kerner*, 40 U.S.L.W. 4156 (U.S., Jan. 13, 1972), or for reworking accepted principles of federal jurisdiction in one sweep of the judicial pen.[1]

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[1] I fully agree with my brother Friendly, for the reasons stated in his opinion, that abstention would be wholly inappropriate here.

In Banc Opinion and Order (January 25, 1972).

The Supreme Court's decision in *Wilwording* will not lead to the subversion or circumvention of the *habeas corpus* exhaustion requirement, codified in 28 U.S.C. § 2254(b), which is concerned with prisoner challenges to the validity of state court convictions or sentences. *See Sostre* v. *McGinnis*, 442 F.2d at 182. *See also Fay* v. *Noia*, 372 U.S. 391, 419-20 (1963); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 172-73 (1948). Collateral attack on a final state court adjudication is *toto caelo* from an untried constitutional claim unrelated to a prior proceeding. Under these circumstances, I see no basis for radically expanding the impact of § 2254(b) or, to put it another way, for concluding that Congress intended by that section to carve out an exception to § 1983 for state prisoners challenging an invasion of their constitutional rights during confinement and stating a valid claim for equitable relief. Indeed, the *sua sponte* construction by the Supreme Court of Wilwording's petition as a complaint under § 1983 clearly articulates that state prisoners alleging deprivation of constitutional rights by prison officials are not forced to mold their claim for relief in the form of a petition for a writ of *habeas corpus*. I find it difficult to believe that the Court, specifically confronted with the alternative modes of pleading, overlooked or did not consider fully the interaction of 28 U.S.C. § 2254(b) and 42 U.S.C. § 1983.[2]

FEINBERG, *Circuit Judge* (concurring):

I agree with Judges Kaufman and Smith that under the authorities there is simply no basis for requiring these state prisoners to exhaust state judicial remedies as a condition to bringing an action for equitable relief under 42 U.S.C. § 1983. And I further agree with them and with

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[2] I agree with the views expressed by my brothers in their separate concurrences with this opinion.

Chief Judge Friendly that application of the abstention doctrine is not appropriate.

Were those my complete views on these cases, I would resist the temptation to add yet another opinion and would simply concur since by brothers have admirably and succinctly covered those issues. However, there is a further point—perhaps implicit in their opinions—that I believe should be made. If the already over-burdened federal courts are being overwhelmed by frivolous prisoner petitions, it surely is desirable to find some way of coping with that problem in a manner that is nonetheless fair and just to prisoners, whose claims of mistreatment have too often been ignored in the past. But the correct way to reach that result is not for us to indulge in judicial legislation but for Congress to enact an appropriate statute, which could take into account the conflicting policy considerations and could include compromises, limitations and safeguards that we as a court cannot legislate.

MANSFIELD, *Circuit Judge* (concurring):

I concur in Judge Friendly's opinion. I would add that prior to *Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (U.S. Dec. 14, 1971) (*per curiam*), my view was that even though there might be cases where a state prisoner's complaint, purportedly brought pursuant to § 1983, could not be treated as a petition for *habeas corpus*, a federal court, upon its finding that the prisoner was seeking equitable relief and was afforded an adequate state court remedy (as here), had the discretionary power as a court of equity to defer action pending the prisoner's application to the state court for relief. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944); *Alabama* v. *United States*, 304 F.2d 583, 590 (5th Cir), *aff'd. per curiam*, 371 U.S. 37 (1962);

Pugach v. *Dollinger*, 277 F.2d 739, 742 (2d Cir. *en banc* 1960), *aff'd.*, 365 U.S. 458 (1961). Upon the prisoner's showing that the state would not offer a reasonably prompt and fair hearing, on the other hand, the federal court would be required to proceed.

The competence of New York state courts to apply federal constitutional principles is not disputed. In most instances their facilities are closer to the state prison in which the prisoner-plaintiff is located (and where regular state court sessions are held) than is the nearest federal court. Furthermore the state court is in a position to insure greater cooperation on the part of essential state personnel (*e.g.*, local and state police, clerks, sheriffs, court reporters and officers of state and county departments) than is the federal court. For example, unless *Wilwording* is limited, suits for injunctive relief by prisoners of one of New York's largest institutions, Clinton Prison, Dannemora, Clinton County, must be heard by the United States District Court for the Northern District of New York, which is located in Albany, 180 miles away. The single federal judge, with only two holding cells and two deputy marshals at his command, will face the necessity of bringing prisoner-plaintiffs and other prisoner-witnesses on a 360-mile round trip in federal custody. By way of contrast, the New York Supreme Court for Clinton County, with no appreciable calendar problem, is equipped to hold court in a nearby county courthouse or in the prison itself.

The extent to which state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes, often merely with a view to the prisoner's availing himself of the change of scenery offered by federal facilities, is attested to by statistics compiled by the Administrative Office of the United States Courts. The 1971 Annual Report of its Director reveals (Table 14, II-48) that from 1968 to 1971 state prisoners' *habeas corpus* petitions in the United States district courts increased 30%, whereas civil rights

suits increased 170%, and that from 1970 to 1971 such *habeas corpus* petitions declined 7.6%, while such civil rights petitions increased 43.6%.

OAKES, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of Judges Smith and Kaufman, agreeing as I do with the original reasoning of Judge Waterman in his dissent in *Rodriguez* v. *McGinnis*, Docket No. 34567 (2d Cir., Mar. 16, 1971), and Judge Smith in his dissent in *Katzoff* v. *McGinnis*, 441 F.2d 558, 560 (2d Cir. 1971). It is not my impression that the federal courts are being overwhelmed with frivolous prisoners' petitions—indeed, many have been highly meritorious. But I agree with Judge Feinberg that if the courts were so burdened, judicial legislation is not the appropriate method of meeting the problem.

To the extent that the dissenting opinion of Judge Lumbard and the concurring opinions of Chief Judge Friendly and Judge Mansfield make arguments directed to the Congress that warrant further reply, that reply, it seems to me, may more appropriately be made in some place other than a judicial opinion. To the extent that those same opinions imply a request to the Supreme Court to reconsider and overrule its own line of cases sustaining jurisdiction, the most recent of which may be *Haines* v. *Kerner*, 40 U.S.L.W. 4156 (U.S., Jan. 13, 1972). I would simply register my vehement disagreement.

TIMBERS, *Circuit Judge*, concurs in the opinions of Judges Smith, Kaufman and Feinberg.

In Banc Opinion and Order (January 25, 1972).

LUMBARD, *Circuit Judge* (dissenting), with whom MOORE and HAYS, *Circuit Judges*, concur:

I dissent.

Three petitioners seek federal court orders which would direct state prison authorities to take action to correct allegedly unconstitutional treatment.

Michael Katzoff, formerly an inmate of Green Haven Correctional Facility serving a sentence of one to three years for possession of a dangerous weapon, complains that the state acted unconstitutionally in depriving him of good behavior time as punishment for recording offensive remarks in his dairy.

Eugene Rodriguez, formerly an inmate of the Ossining Correctional Facility serving a term of one and one-half to four years for the crimes of perjury and attempted larceny, complains that the state unconstitutionally cancelled good time for either possession of contraband or refusal to disclose its source.

John Kritsky, presently an inmate of Clinton Correctional Facility serving a sentence of 15 to 18 years for the crime of armed robbery, complains of unconstitutional deprivation of good time because of his participation in an inmate strike at Auburn Correctional Facility.

All these actions were brought under 42 U.S.C. § 1983, and in each case the district court granted relief to the petitioner. I would reverse the orders of the district courts and remand with directions to stay further proceedings pending a hearing of the claims in the state court.

Prior to *Wilwording* v. *Swenson*, decided December 14, 1971, 40 U.S.L.W. 3277, I had hoped that these three cases could be resolved, consistent with Supreme Court authority, by a requirement of exhaustion of state remedies as a condition precedent to a cause of action in the federal courts under the Civil Rights Act by a state prisoner seek-

ing equitable relief from allegedly unconstitutional prison conditions or sanctions. *Wilwording* suggests the contrary, but it dealt with an inmate in a Missouri prison and Missouri apparently makes no provision for hearing such cases in its courts.[1] I still think there is room to hold that a District Court in New York—which does provide an adequate remedy in its courts for the redress of legitimate prisoner complaints[2]—should refrain from hearing such a case until the state court has acted thereon, so long as on-going physical brutality is not involved, as it was in *Inmates of Attica* v. *Rockefeller*, decided by this court December 1, 1971, slip op. p. 739.

I am not unmindful that what the Court has said *per curiam* in *Wilwording* follows much that was said along the same lines in *Monroe* v. *Pape*, 365 U.S. 167 (1961), *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), *Damico* v. *California*, 389 U.S. 416 (1967), and *Houghton* v. *Shafer*, 392 U.S. 639 (1968). Only in *Houghton*, however, was the petitioner serving a sentence in a state prison, and it does not appear from the record what, if any, remedies were available to Houghton in the Pennsylvania state court. In any event, the Court did not pass on the considerations which seem to me to compel the conclusion that the federal courts should not hear these cases in the first instance where the state courts are ready, willing and able to give relief.

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[1] *See Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (Dec. 14, 1971).

[2] *See* Civil Rights Law § 79-c, McKinney's Consol. Laws c. 6, which was added in response to this court's decision in *Wright* v. *McMann*, 387 F.2d 519 (1967). This amendment, "remedial in nature, designed to correct an imperfection in the prior law or to provide a remedy for a wrong if none previously existed, is to be liberally construed so as to spread its beneficial results as widely as possible. . . ." *Marcelin* v. *Scott*, 304 N.Y.S. 2d 299, 300-301 App. Div. 1969).

The resolution of differences between inmates and jailers in state prisons is peculiarly a matter of state interest and concern. These matters can better be determined by the state court which is nearby and available for immediate resolution of such disputes. For some years justices of the Supreme Court of the State of New York, the highest trial court of general jurisdiction, have held court in courtrooms within the confines of the prisons. Thus the petitioning prisoner and any necessary witnesses can be heard with a minimum of risk and expense. By contrast, a hearing in the federal courts requires that prisoners must be moved considerable distances under circumstances presenting a danger of escape and injury to members of the public, to say nothing of substantial expense to the state.

Recent unrest and dissatisfaction in New York state prisons reached a tragic climax at Attica Correctional Facility where a four-day inmate uprising took a death toll of 11 hostages and 32 inmates. Allowing a state prisoner the choice of being heard in a federal court would seem an obvious means of exacerbating relations between state prisoners and their jailers. Obviously the holding of a hearing at a distant federal court is a far greater interruption of prison life and routine than a hearing inside a state prison by a state judge. *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971) (*en banc*), is a good example of what may frequently be involved in a federal court hearing. That case was tried before Judge Motley in the Southern District of New York during seven days of trial extending from Wednesday, October 29, 1969 to Friday, November 7, 1969. In addition to Sostre, who was brought from Walkill Correctional Facility, Walkill, New York, to testify, two other state prisoners were transported to the hearing from Green Haven Correctional Facility, Stormville, New York. The warden, the food service manager, a doctor,

and eleven guards from Green Haven testified. Five guards from Attica Correctional Facility, Attica, New York, testified, as did one from Clinton Correctional Facility, Dannemora, New York.

If the federal courts must hear these suits and resolve factual issues, it is a clear invitation to state prisoners to frame complaints of alleged mistreatment so that they will, at the least, be afforded some vacation from the tedium of prison life.

It could hardly have been the intention of the Congress in enacting § 1983 that it would be the means whereby state prisoners would place state authorities on trial for the manner in which they were cared for and disciplined in state prisons. But there can be no doubt that it is becoming the fashion for state prisoners to bring these suits. The totals for state prisoner civil rights suits commenced in the federal courts of the Second Circuit for the past six fiscal years[1] tell the story—

1966	21
1967	62
1968	72
1969	138
1970	277
1971	585

All but 38 of the 585 cases filed in 1971 were filed in the four districts of New York. While these totals for state prisoner civil rights suits are still less than those for state prisoner *habeas corpus* petitions in the Second Cir-

[1] These figures are a breakdown of the national totals reported in Table 14 in the 1971 Criminal Report of the Director of the Administrative Office of the United States Courts, prepared by the Division of Information Systems of the Administrative Office.

cuit, which have risen from 571 to 813 in those same years, it should be borne in mind that a very high percentage of the *habeas corpus* petitions can be, and are, disposed of on the face of the petition or after submission of a paper record. By contrast, a very large percentage of Civil Rights Act cases can be disposed of only after a hearing at which the petitioner and others will be produced as witnesses. In the *habeas corpus* cases a record has already been made in the state court, whereas civil rights cases always raise issues which have recently arisen and are wholly undetermined.

It is now quite clear that state prisoners are turning more and more to the Civil Rights Act to redress their grievances and for therapeutic relief, rather than to *habeas corpus*. They not only hope to get an earlier hearing but they also expect a vacation from prison confinement. Unless the district courts can, in the exercise of discretion, stay their hands pending determination of suit in those state courts which will hear the cases, the federal courts will find themselves in the business of running and regulating state prisons.

If the course I propose is followed, certainly it would still be open to the state prisoner to ask the federal court to examine his complaint *de novo*, upon a showing that the state court hearing had not been a full and fair one. *Cf. Townsend* v. *Sain*, 372 U.S. 293 (1963), and 28 U.S.C. §2254(d).

For the above reasons, I would direct the district courts in the three cases before us to stay action until the state court has passed upon the matters complained of by these state prisoners.

PETITION FOR A WRIT OF CERTIORARI

FILED
APR 24 1972
MICHAEL RODAK, JR., CLERK

71-1369

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes	3
Statement	6
Rodrigues	6
Katsoff	8
Kritsky	9
The *In Banc* Opinions	10
REASONS FOR GRANTING THE WRIT—These cases present the important and recurring question of whether prisoner claims regarding the conditions of confinement should properly be brought by way of habeas corpus or under the Civil Rights Act. This issue has never been resolved by this Court and the numerous and conflicting opinions of the Court of Appeals demonstrate the necessity for such a resolution	16
The Implications for the State Prisoner	21
The Implications for Federal-State Relations	24
Conclusion	28

Cases Cited

PAGE

Bivens v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) 27

Carafas v. *LaVallee*, 391 U.S. 234 (1968) 19

Coffin v. *Reichard*, 143 F. 2d 443 (6th Cir. 1944) 25

Damico v. *California*, 389 U.S. 416 (1967) 15

Daugherty v. *Craven*, 422 F. 2d 7 (9th Cir.), cert. denied 397 U.S. 964 (1970) 20

Douglas v. *Sigler*, 386 F. 2d 684 (8th Cir. 1967) 25

Gomez v. *Miller*, —— F. Supp. ——, 71 Civ. 2411 (S.D.N.Y., April 14, 1972) 18

Haines v. *Kerner*, 406 U.S.L.W. 4156 (U.S., Jan. 13, 1972) 11

Harris v. *Nelson*, 394 U.S. 286 (1969) 22, 23

Houghton v. *Shafer*, 392 U.S. 639 (1968) 12, 15, 24

Johnson v. *Avery*, 393 U.S. 483 (1969) 20, 25

Jones v. *Cunningham*, 371 U.S. 236 (1963) 19

Kritsky and United States ex rel. Kritsky v. *Oswald, et al.*, 313 F. Supp. 1247 (N.D.N.Y. 1970) 1

Landman v. *Royster*, 333 F. Supp. 621 (E.D. Va. 1971) 20, 27

Light v. *United States*, 430 F. 2d 932 (5th Cir. 1970) 25

Lloyd v. *Heritage*, 199 F. Supp. 46 (N.D. Ga. 1961) .. 25

McKinney v. *Taylor*, 344 F. 2d 854 (10th Cir. 1965) .. 25

Morris v. *Wingo*, 421 F. 2d 651 (6th Cir. 1970) 20

Murphy v. *Turner*, 426 F. 2d 422 (10th Cir. 1970) 20

Nelson v. *George*, 399 U.S. 224 (1970) 19

Oswald, et al. v. *Gesicki, et al.*, 336 F. Supp. 365 (S.D.N.Y. 1971) 18

PAGE

McNeese v. *Board of Education*, 373 U.S. 668 (1963) 15

Monroe v. *Pape*, 365 U.S. 167 (1961) 15

Peyton v. *Rowe*, 391 U.S. 54 (1968) 19

Pierce v. *LaVallee*, 293 F. 2d 233 (2d Cir. 1961) 25

Powell v. *Hunter*, 172 F. 2d 330 (10th Cir. 1949) 25

Rodriguez and United States ex rel. Rodriguez v. *Oswald, et al.*, 451 F. 2d 730 (2d Cir. 1971) ...1, 10, 11, 12

Rodriguez and United States ex rel. Rodriguez v. *Oswald, et al.*, 307 F. Supp. 627 (N.D.N.Y. 1969) ... 2

Royster v. *McGinnis*, 332 F. Supp. 973 (S.D.N.Y. 1971), probable jurisdiction noted, 40 U.S.L.W. 3449 (March 20, 1972) 18

Smith v. *Follette*, 445 F. 2d 955 (2d Cir. 1971) 20

Smoake v. *Willingham*, 359 F. 2d 386 (10th Cir. 1966) 25

Sostre v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (*in banc*), cert. denied *McGinnis* v. *Sostre*, —— U.S. ——, 40 U.S.L.W. 3428 (March 7, 1972) 9, 16

Strowder v. *Shovlin*, 380 F. 2d 370 (3d Cir. 1967) 20

Sullivan v. *Ciccone*, 311 F. Supp. 456 (W.D. Mo. 1970) 25

Townsend v. *Sain*, 372 U.S. 293 (1963) 23

United States v. *Marchese*, 341 F. 2d 782 (9th Cir. 1965) 25

United States ex rel. Katzoff v. *Oswald, et al.*, 441 F. 2d 558 (2d Cir. 1971) 1, 2, 10, 11

United States ex rel. Meadows v. *New York*, 426 F. 2d 1176 (2d Cir. 1970) 19

United States ex rel. Schuster v. *Herold*, 410 F. 2d 1071 (2d Cir. 1969), cert. denied 396 U.S. 847 ... 20

PAGE

United States ex rel. Weyrauch v. *Parker*, 268 F. Supp. 785 (M.D. Pa. 1967) 25

Wilwording v. *Swenson*, 404 U.S. 249 (1971) 11, 17

Wilwording v. *Swenson*, 439 F. 2d 1331 (8th Cir. 1971) 12, 14, 15, 18, 20, 24, 25, 27, 28

Wright v. *McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970), aff'd. in part, mod. in part, rev'd in part, —— F. 2d —— (2d Cir., March 16, 1972, Sl. Sh. Op. 2131) 26

Wright v. *McMann*, 387 F. 2d 519 (2d Cir. 1967) 25

STATUTES CITED

18 U.S.C. § 4161 25

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2241 ..... 3, 19

28 U.S.C. § 2243 .....3, 4, 21, 22

28 U.S.C. § 2254 .....4, 5, 8, 9, 11, 13, 18, 20, 21

42 U.S.C. § 1983 .....5, 14, 16, 27

Fed. R. Civ. Pro. 26-37 23

N.Y. Correction Law § 236 .....5, 6, 7, 10

N.Y. Civil Rights Law § 79-c 15

MISCELLANEOUS

"Developments in the law—Federal Habeas Corpus", 83 Harv. L. Rev. 1038 (1970) 20

"Exhaustion of State Remedies Under the Civil Rights Act", 68 Colum. L. Rev. 1201 (1968) 24

Note, "Limiting the Section 1983 Action in the Wake of *Monroe* v. *Pape*", 82 Harv. L. Rev. 1486 (1969) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit in the cases of *Eugene Rodriguez and United States ex rel. Eugene Rodriguez* v. *Oswald, et al.*, *United States ex rel. Michael Katzoff* v. *Oswald, et al.*, and *John Kritsky and United States of America ex rel. John Kritsky* v. *Oswald, et al.* These cases were heard by the Court sitting *in banc* and were decided on January 25, 1972.

Opinions Below

The *in banc* decision of the Court of Appeals has not been officially reported to date. A copy is filed with this petition as Appendix "A". The decision of the panel which initially decided the *Rodrigues* case is reported at 451 F. 2d 730 (2d Cir. 1971). It is filed with this petition as Appendix "B". The District Court opinion in *Rodrigues* is reported at 307 F. Supp. 627 (N.D.N.Y. 1969) and is filed herewith as Appendix "C".

The opinion of the Second Circuit panel which initially decided the *Katsoff* case is reported at 441 F. 2d 558 (2d Cir. 1971) and is filed herewith as Appendix "D". The District Court opinion in *Katsoff* has not been officially reported. A copy is filed with this petition as Appendix "E".

No decision was rendered by the panel which heard the appeal in the *Kritsky* case. The opinion of the District Court is reported at 313 F. Supp. 1247 (N.D.N.Y. 1970) and is filed herewith as Appendix "F".

Jurisdiction

The judgment of the Court of Appeals was entered on January 25, 1972.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Question Presented

Should State prisoners have the option of challenging the conditions of their confinement by means of the Civil Rights Act when there exists an appropriate remedy by way of habeas corpus?

Statutes

28 U.S.C. § 2241:

"Power to grant writ:

• • •

(c) The writ of habeas corpus shall not extend to a prisoner unless—

• • •

(3) He is in custody in violation of the constitution or laws or treaties of the United States . . ."

28 U.S.C. § 2243:

"Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

28 U.S.C. § 2254:

"State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * *

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to

support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

42 U.S.C. § 1983:

"Civil Action For Deprivation of Rights

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

New York Correction Law § 236:

"In all cases . . . where the [prison commutation] board shall withhold the allowance of the whole or any part of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, they shall forward with their report to the

commissioner of correction their reasons in writing for such disallowance. The action of the board in granting or withholding reductions shall be deemed a judicial function and shall not be reviewable if done according to law."

Statement

Each of the respondents herein was confined in a correctional facility of the State of New York at the time he commenced his *pro se* action in the federal courts. Each filed a combined civil rights complaint and petition for a writ of habeas corpus seeking his release from prison without previously seeking relief in the State Courts. Each asserted that he had been unconstitutionally deprived of his conditional release from prison by the action of the defendants in disallowing him a certain number of good conduct time credits, which action allegedly represented cruel and inhuman punishment. None of the respondents challenged the validity of his conviction or the sentence imposed.

A hearing was held in each case at which the respondents were represented by counsel. All three respondents received a favorable decision on the merits, resulting in the restoration of the disputed credits and immediate release from physical confinement. According to the records of the New York State Department of Correctional Services, the sentences of respondents Rodrigues and Katzoff have run. The maximum expiration date of respondent Kritsky is February 22, 1975.

Rodrigues

The underlying claim made by respondent Rodrigues in the District Court was that the determination disallowing the good conduct time in question was made without adequate notice and hearing and therefore violated his right to due process. At the District Court hearing he acknowl-

edged that he had been charged with the possession of certain contraband letters and photographs which he admitted having received but asserted that he was not punished for this but because he refused to tell prison authorities how he had received the contraband correspondence.

In granting relief the District Court preliminarily held that the action brought by respondent was an action under the Civil Rights Act and that the habeas corpus aspect was "merely a proper adjunct to insure full relief" in the event the respondent sustained his underlying claim. Therefore, respondent was not required to exhaust his state court remedies (34a).

The District Court accepted respondent's version of the summary procedures by which the determination was reached and found that the questioning by prison officials was solely in regard to how he got the uncensored materials into Sing Sing (39-40a). However, the Court made no specific finding that the assessment of time was a consequence of the refusal to inform. Although the Court expressed concern with the summary procedures employed, the decision specifically turned on the failure of the Prison Commutation Board to comply with the requirement of § 236 of the New York Correctional Law that it advise the Commissioner of Correction in writing of its reasons for upholding the disallowance of good behavior time. He deemed this omission "substantial" and held that it deprived respondent of both due process and equal protection of the law (41a).

On appeal the Second Circuit reversed the decision by a vote of 2 to 1. The majority rejected the District Court's "view that questions of constitutional significance are involved" (21a) concluding that (a) Correction Law § 236 is not constitutionally required and (b) respondent was not punished for the refusal to inform and, moreover, even if he had been, this would not have been unconstitutional (22a). The Court held that, in any event, the decision was

reversible because respondent Rodriguez had failed to exhaust his state court remedies as required by 28 U.S.C. § 2254(b) and (c).

Judge Waterman, dissenting, concluded that the record below demonstrated that the punishment was based on the refusal to inform, that this violated Rodriguez' constitutional rights and that while the violation of the Correction Law, standing alone, was not unconstitutional, it became so in the context of all that had occurred (26-27a).

Katzoff

Respondent Katzoff lost 50 days credit as a result of making derogatory comments about prison officials in his diary. He challenged the actions of prison officials as (1) having been taken without meeting the requirements of due process, (2) constituting cruel and inhuman punishment and (3) violating his rights under the First Amendment.

The District Court found that no rule or regulation barred the keeping of a diary; that the institution was aware that respondent Katzoff was keeping a diary and that there was no evidence that the contents of the diary were in any way made public to other inmates (51-52a).

The Court found as a matter of law that the petition was in the nature of a civil rights action and that the issuance of a writ of habeas corpus was only incidental as a means of enforcing the judgment (54a). While the procedure followed did not violate due process, punishment for acts not amounting to a violation of any institution rule did amount to such a violation. The Court further found that assuming such a regulation existed, the punishment of respondent for his unpublished comments by placing him in segregation with the accompanying loss of good time credit violated his rights under the First and Fourteenth Amendments (55a).

The Court directed the restoration of the time in issue and ordered respondent's immediate release.

A panel of the Second Circuit reversed the District Court by a vote of 2 to 1 without considering the merits on the ground that respondent Katzoff had failed to exhaust his remedies as required by 28 U.S.C. § 2254(b). The Court found that respondent was seeking release from custody and therefore, in essence, seeking habeas corpus relief.

> "There is no basis for limiting the concept of habeas corpus to attacks on custody because of defects in the original conviction as distinguished from a failure to allow release according to law. '[R]elease from a penal custody is not an available remedy under the Civil Rights Act.' " (46a)

The Court rejected an argument that state remedies were inadequate because of the proximity of the release date as assuming

> "without justification that state courts will be less responsive to a constitutional claim than the federal courts. There is no authority for the proposition that the proximity of release relieves a prisoner of the exhaustion requirements of Section 2254(b)." (47a)

Judge Smith dissented stating that this was not habeas corpus since the conviction and sentence were not being challenged. He cited the Circuit Court's opinion in *Sostre v. McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (*in banc*), cert. denied *McGinnis* v. *Sostre*, —— U.S. ——, 40 U.S.L.W. 3428 (March 7, 1972) as allowing a civil rights action to seek restoration of good time, at least in a case of First Amendment rights and concluded that the fact that the restoration of credits resulted in release should not deprive an inmate of a federal forum under the Civil Rights Act.

Kritsky

The forfeiture of time in respondent Kritsky's case followed an institution-wide demonstration by the inmates

of Auburn Correctional Facility in 1962. Respondent Kritsky claimed that he was charged with being a leader in the demonstration and that, in summary proceedings at which he pleaded not guilty, he was assessed 18 months good time credits. At the hearing in the District Court he acknowledged that he had participated in the demonstration and that if he had come out of his cell the first day and stayed out he would not have lost any time. However, the following day, instead of going to his job he voluntarily returned to his cell and stayed there in further protest.

After noting both the serious nature of the incident leading to the time disallowance and respondent Kritsky's acknowledgment that he was involved in it, the District Court held that the disciplinary hearing given him violated his right to due process (72a). The Court also determined that the Prison Commutation Board had not filed written reasons with the Commissioner for disallowing the time as required by § 236 of the New York Correction Law. Accordingly, the Court directed that the time credits in issue be restored and ordered respondent's immediate release.

An appeal was argued before a panel of the Second Circuit but no decision had been reached as of the time that the three cases herein were ordered to be heard *in banc*.

The *In Banc* Opinions

Petitions for rehearing were denied by the respective panels which heard *Rodrigues* and *Katzoff*, on July 19, 1971 with Judge Waterman dissenting in *Rodrigues* and Judge Smith dissenting in *Katzoff*. At the request of the petitioners and of these judges a majority of the judges in active service voted for reconsideration in these cases *in banc* and, further, for initial consideration *in banc* of the *Kritsky* case, all three cases to be consolidated. On October 12, 1971 the matter was set down for argument

and counsel were specifically advised "to be prepared to discuss the need for the petitioners to exhaust state remedies and the possibility of abstention."

On January 25, 1972, the Court issued an order affirming, 9 to 3, the judgments of the District Court in all three cases "upon consideration of the merits and upon the authority of *Wilwording* v. *Swenson*," 404 U.S. 249 (1971). Eight judges wrote separate opinions.

Chief Judge Friendly had previously voted for reversal but felt bound to affirm the orders of lower court after this court decision in *Wilwording*.

He expressed concern for the effect on federal-state relations caused by petitions of state prisoners complaining of the "time or conditions of their confinement" and pointed out that the concern for these relations "is not limited to attacks on the validity of the convictions". However, he concluded that if these petitions are held to be in the nature of civil rights actions, a federal court cannot require exhaustion of state remedies because of the decisions of this Court, including *Wilwording*, and because, in view of the *res judicata* effect, "abstention would mean abdication in any case where the state afforded a fair hearing" (4a).

Judge Friendly suggested instead that the

> "right answer . . . is that, under the broad scope the Supreme Court has given to the 'Great Writ' as enacted by the Act of 1867, 14 Stat. 385, all state prisoner petitions complaining of the length or manner of custody, however phrased, are in fact petitions for habeas corpus . . ."

to which the exhaustion requirement of § 2254(b) is applicable (4-5a). As such they would not be subject to *res judicata*.

Judge Friendly acknowledged that several cases, including *Houghton* v. *Shafer*, 392 U.S. 639 (1968) and *Jackson* v. *Bishop*, 404 F. 2d 571 (8th Cir. 1968), cited in *Wilwording*,

> "have assumed that state prisoner complaints over the conditions of custody come under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) rather than under 28 U.S.C. § 2254. But the issue was not there raised, and the problem of such prisoner applications had not yet reached its present dimensions." (5a)

This analysis, if correct would seem to preclude an inmate from avoiding the exhaustion requirement simply by denominating the petition as one under the Civil Rights Act. "But *Wilwording* seems to indicate that he can" and, therefore, Judge Friendly felt constrained to affirm (5a).

Judge Waterman concurred in the affirmance and referred to his dissenting opinion in *Rodrigues* v. *McGinnis*, 451 F. 2d 730 (2d Cir. 1971).

Judge Smith, concurring, concluded that neither the doctrine of abstention nor the habeas corpus exhaustion requirement could bar a state prisoner from choosing a federal forum under the Civil Rights Act. In addition, he questioned whether the federal courts should attempt to avoid or delay hearing state prisoners' complaints of unconstitutional abuse since although many petitions "are poorly prepared, confusing and mendacious" and "do take the time of busy courts", the instant cases demonstrate that there are cases of substance which make the "effort worthwhile" (6a).

Judge Kaufman viewed the question for decision solely in terms of whether exhaustion of judicial remedies was required before a state prisoner could seek relief under the Civil Rights Act and concluded that it was not, especially after *Wilwording* (7a). He did not deal with the question of whether the claims before the Court were properly

brought under the Civil Rights Act to begin with but assumed that they were. Indeed, except for Judges Friendly and Mansfield, none of the judges who wrote opinions undertook to discuss, let alone resolve this question.

In Judge Kaufman's view

> "federal jurisdiction in cases involving prisoner rights is [no] more offensive to the state than federal jurisdiction in the areas of police procedures for search, arrest and detention . . . or education . . . or welfare . . . or public housing . . ." (8a)

In any event, neither this reason nor the increasing burden on the federal courts is a "tolerable basis for declining jurisdiction where a prisoner specifically alleges facts indicating a callous disregard of his basic human and unconstitutional rights, see *Haines* v. *Kerner*, 406 U.S.L.W. 4156 (U.S., Jan. 13, 1972)" (8a).

Judge Kaufman reasoned that allowing inmates the option of proceeding under the Civil Rights Act would not subvert the exhaustion requirement of the habeas corpus statute since 28 U.S.C. § 2254(b) is intended to apply only where the original conviction and sentence are being challenged (8-9). In so doing he ignored the fact that in *Wilwording* this Court assumed the applicability of the exhaustion requirement to such claims if brought by way of habeas corpus. On the other hand, Judge Kaufman relied upon the fact that in *Wilwording* this Court *sua sponte* construed the petition as in the nature of a civil rights action and he concluded from this that inmates have an option to use either procedure.

"I find it difficult to believe that the Court, confronted with the alternative modes of pleading, overlooked or did not consider fully the interaction of 28 U.S.C. § 2254(b) and 42 U.S.C. § 1983." (9a)

Judge Feinberg also rejected the applicability of the exhaustion and abstention doctrines suggesting that in view of the overwhelming numbers of "frivolous prisoner peti-

tions" some fair way of dealing with the problem is called for but it must come by way of a statute from Congress

> "which could take into account the conflicting policy considerations and could include compromises, limitations and safeguards that one as a court cannot legislate." (10a)

Judge Mansfield stated that prior to *Wilwording* he believed that

> "a federal court, upon its finding that the prisoner was seeking equitable relief [in a § 1983 complaint which could not be treated as a petition for habeas corpus] and was afforded an adequate state court remedy (as here), had the discretionary power as a court of equity to defer action pending the prisoner's application to the state court for relief. . . . Upon the prisoner's showing that the state would not afford a reasonably prompt and fair hearing, on the other hand, the federal court would be required to proceed." (10-11a)

In support of this view Judge Mansfield emphasized both the competence and convenience of the state courts in regard to this particular type of claim. He also cited statistics which attest to the

> "extent to which state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes, often merely with a view to the prisoner's availing himself of the change of scenery offered by federal facilities. . . ." (11a)

Judges Oakes disputed the suggestion that the federal courts are being flooded by frivolous claims of state prisoners but if such a burden has been created the solution must come from the Legislature. He further expressed his "vehement disagreement" with the opinions of Judge Friendly and Mansfield to the extent that they "imply

request to the Supreme Court to reconsider and overrule its own line of cases sustaining jurisdiction . . ." (12a).

Judge Lumbard dissented together with Judges Hayes and Moore stating that he favored reversing and remanding to the District Court "with directions to stay further proceedings pending a hearing of the claims in the state court" (13a).

Judge Lumbard acknowledged that *Wilwording* suggests that state prisoners need not exhaust their state judicial remedies prior to invoking § 1983 but pointed out that in that case it was clear that Missouri Courts did not review such claims. By contrast, New York "does provide an adequate remedy in its courts for the redress of legitimate prisoner complaints" (14a) [citing Section 79-c of the New York Civil Rights Law] and, therefore, except in cases of on-going physical brutality, he would require prior resort to this remedy.

Although this Court's decisions in *Monroe* v. *Pape*, 365 U.S. 167 (1961), *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), *Damico* v. *California*, 389 U.S. 416 (1967) and *Houghton* v. *Schafer*, 392 U.S. 639 (1968) have been relied upon to reach the contrary conclusion, Judge Lumbard emphasized the fact that only *Houghton* involved a state prisoner's claim and there was no evidence there regarding the nature of state remedies available.

> "In any event, the Court did not pass on the considerations which seem to me to compel the conclusion that the federal courts should not hear these cases in the first instance where the state courts are ready, willing and able to give relief." (14a)

These considerations include the state's interest in resolving disputes between "inmates and jailers", the greater convenience of hearing these claims in nearby state courts and the potential for increasing tension in the institution as a result of permitting review in the federal courts (13a). Judge Lumbard cited by way of example the

dislocation caused by the lengthy hearing in *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (*in banc*). If the state court hearing is not full and fair, the inmate would still have available a *de novo* review in the federal court.

Judge Lumbard included statistics showing that the number of civil rights actions filed in the Second Circuit by state prisoners has increased from 21 in 1966 to 88 in 1971 and disputed that § 1983 was intended to "be the means whereby state prisoners would place state authorities on trial for the manner in which they were cared for and disciplined in state prisons" (16a). Although more habeas corpus petitions are filed Judge Lumbard pointed out that many of these can be disposed of on the papers whereas many § 1983 actions require hearings and the testimony of witnesses. Furthermore, in habeas corpus

> "a record has already been made in the state court, whereas civil rights cases always raise issues which have recently arisen and are wholly undetermined." (17a)

Judge Lumbard warned that unless the district courts defer these matters to the state courts as a matter of discretion, "the federal courts will find themselves in the business of running and regulating state prisons" (17a).

REASONS FOR GRANTING THE WRIT

These cases present the important and recurring question of whether prisoner claims regarding the conditions of confinement should properly be brought by way of habeas corpus or under the Civil Rights Act. This issue has never been resolved by this Court and the numerous and conflicting opinions of the Court of Appeals demonstrate the necessity for such a resolution.

The Second Circuit heard the instant cases *in banc* not because of the substantive issues raised but in order to

resolve the recurring question of who should initially hear complaints by state prisoners relating to the conditions of their confinement. It is evident from the many opinions filed with the Court's order that prior to this Court's per curiam decision in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971), the Court of Appeals was equally divided on this important question. Moreover, even after *Wilwording* three judges joined in a vigorous dissent and many in the majority were reluctant about the conclusion reached.

The concern for how these cases should be reviewed is entirely warranted as increasing numbers of state prisoners make known their grievances by proceeding under the Civil Rights Act instead of under the habeas corpus statute which has a specific exhaustion requirement. This trend will inevitably result in the practical restriction of the habeas corpus statute to attacks on the original conviction and sentence. Moreover, in view of the already congested condition of the federal civil dockets the impact of this trend will not only be felt by the courts but ultimately by the prisoners as well.*

The threshold question which is critical to a determination of whether these cases are properly a burden to be borne by the federal courts—at least in the first instance—is whether they should be treated as civil rights actions or as habeas corpus petitions. With the exception of Judges Friendly and Mansfield this question was not

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*Chief Judge David N. Edelstein of the United States District Court for the Southern District of New York in a speech before the New York County Lawyer's Association stated that as of December 31, 1971, there was a backlog in the Southern District of 13,944 civil cases. New York Law Journal, February 3, 1972, Page 1, Col. 4.

considered by the Second Circuit which instead simply examined the need to exhaust under the Civil Rights Act.*

Furthermore, the Court of Appeals relied upon this Court's opinion in *Wilwording* although the proper nature of the cause of action was neither discussed in the opinion nor presented by the parties in that case who instead were concerned solely with the exhaustion requirement of 28 U.S.C. § 2254(b) as applied to the habeas corpus petition there involved.

We believe that the unmistakable trend toward state prisoner reliance on the Civil Rights Act requires a specific examination of whether this is an appropriate remedy given the existence of the habeas corpus statute.

We further believe that the result of such an examination must be that these applications are habeas corpus and must first be presented to the state courts.

At the outset, unlike other persons who seek to assert a constitutional claim, state prisoners have a specific stat-

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* The evident confusion of the Court below is typical of other cases decided within the Second Circuit. See *Oswald, et al.* v. *Gesicki, et al.*, 336 F. Supp. 365 (S.D.N.Y. 1971) (*Lasker*, J.) (jurisdictional statement filed March 9, 1972) (3 judge court convened in action to declare unconstitutional former N.Y. Code of Criminal Procedure § 913-a, the "wayward minor" statute and to invalidate adjudications made pursuant to it); *Royster* v. *McGinnis*, 332 F. Supp. 973 (S.D.N.Y. 1971) (3 judge court) (probable jurisdiction noted, 40 U.S.L.W. 3449, March 20, 1972) (declared unconstitutional N.Y. Correction Law § 230(3) which precludes the earning of good conduct time credits during pre-trial incarceration); *Gomes* v. *Miller*, —— F. Supp. —— 71 Civ. 2411 (S.D.N.Y. April 14, 1972) (3 judge court) (declared unconstitutional state procedure for committing defendants not yet tried to Matteawan State Hospital).

In *Gomes*, although the plaintiffs were not protesting the conditions of their confinement but only the lawfulness of the procedure by which they were confined, the majority, citing *Wilwording*, held that exhaustion of state judicial remedies was not required. In any event, according to the majority, the case could not be classified as habeas corpus because granting the relief sought by the plaintiffs would not result in their release from custody.

statory vehicle for obtaining judicial review which was enacted by Congress and tailored for state prisoners where the gist of the cause of action goes to their custody. 28 U.S.C. § 2241. Therefore, a decision that these cases are civil rights actions would not merely ignore the challenge to custody common to each but would effectively override the intention of Congress.

Moreover, the concept of custody has been expanded by this Court and, concomitantly, so has the relief available by way of habeas corpus. It is now clear that

> "the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that '[t]he court shall . . . dispose of the matter as law and justice require.' 28 U.S.C. § 2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody. At one point, the new § 2244(b) (1964 ed., Supp. II) speaks in terms of 'release from custody or other remedy.'" *Carafas* v. *LaVallee*, 391 U.S. 234, 239 (1968).

As this Court observed in *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963):

> "[The writ of habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."

Thus, recent cases have applied the habeas corpus remedy to questions of solitary confinement, *future* release (*Peyton* v. *Rowe*, 391 U.S. 54 [1968]; *United States ex rel. Meadlows* v. *New York*, 426 F. 2d 1176 [2d Cir. 1970]; *Wilson* v. *George*, 399 U.S. 224 [1970]) and conditions of

confinement imposed by prison authorities. *Johnson* v. *Avery*, 393 U.S. 483 (1969). See *"Developments in the Law—Federal Habeas Corpus"*, 83 Harv. L. Rev. 1038, 1079-1087 (1970); see also *Smith* v. *Follette*, 445 F. 2d 870 (2d Cir. 1971); *United States ex rel. Schuster* v. *Herold*, 410 F. 2d 1071 (2d Cir. 1969), cert. den. 396 U.S. 847; *Strowder* v. *Shovlin*, 380 F. 2d 370 (3d Cir. 1967).

And in *Wilwording* this Court specifically acknowledged that the Eighth Amendment claims there raised relating to "living conditions and disciplinary measures . . . in maximum security confinement" were "cognizable in federal habeas corpus." 404 U.S. at 249, 251.

A fortiori, habeas corpus should be the means of questioning the legality of the duration of custody in good conduct time cases, all of which relate in essence to the right to future release. But see *Landman* v. *Royster*, 333 F. Supp. 621, 650-51 (E.D. Va. 1971). In fact, in the instant cases, restoration of good time credits which had been either withheld or forfeited resulted in respondents' release from physical confinement.* Similarly, claims affecting parole eligibility and parole revocation are natural cases for consideration by way of habeas corpus. *Daugherty* v. *Craven*, 422 F. 2d 7 (9th Cir.), *cert. denied* 397 U.S. 964 (1970); *Morris* v. *Wingo*, 421 F. 2d 651 (6th Cir. 1970); *Murphy* v. *Turner*, 426 F. 2d 422 (10th Cir. 1970).

The habeas nature of all of these cases is not altered by the underlying constitutional issues raised any more than an ordinary habeas corpus application challenging the inmate's conviction is altered by variations in the underlying constitutional claim involved. In both situations the essence of the proceeding is the *legality of custody* and the exhaustion requirement attaches.

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* Release from custody is the traditional and typical relief sought by way of habeas corpus and is unavailable under the Civil Rights Act. A subsequent disavowal by the successful applicant that this was his purpose in bringing the action is both unrealitic and legally irrelevant. Section 2254(a) says nothing about motive.

If state prisoners nevertheless have the option of presenting their grievances under the Civil Rights Act, this Court's expansion of the writ will necessarily be halted as inmates seek to avoid the exhaustion requirement of 28 U.S.C. § 2254(b). The practical consequence must be that habeas corpus relief will be confined to cases involving the validity of the original conviction and sentence. Before this Court sanctions such a result it should squarely examine the implications of doing so.

The Implications for the State Prisoner:

The State prisoner who proceeds under the Civil Rights Act may escape the application of the exhaustion requirement but he also sacrifices the protections available to him under the habeas corpus statute.

Habeas corpus is a flexible, efficient, summary mechanism for redressing extraordinary grievances and is an ideal remedy for reviewing prisoner claims which are almost universally instituted *pro se*. Because it is a summary remedy there is an emphasis on swift determination. The habeas corpus timetable is as follows:

> "The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
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> • • •
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> When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.
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> • • •
>
> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." (28 U.S.C. § 2243).

Since the availability of the writ has been so dramatically expanded in recent years, good cause frequently is

shown for a greater time for preparation for a habeas corpus hearing. Nonetheless when the statute was amended in 1966 (Pub. L. 89-711, November 2, 1966), the time limits of 28 U.S.C. § 2243 remained intact.

In addition the statute imposes an affirmative duty of disclosure on the respondent:

> "(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination." (28 U.S.C. § 2254[e]).

Flexibility inheres in the fact that the District Court is empowered to dismiss applications which are frivolous on their face without even requiring a response by the respondent. The statute thereby satisfies the two overriding requirements in these cases—that non-meritorious claims be culled out as early as possible and that meritorious claims be considered as swiftly and completely as possible.

As this Court emphasized in *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969):

> "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by

courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."

By contrast, the filing of a complaint under the Civil Rights Act initiates an original plenary civil action governed by the full panoply of the Federal Rules of Civil Procedure. Unlike habeas corpus, which under *Townsend* v. *Sain*, 372 U.S. 293 (1963) puts great responsibility for formulating the issues and ascertaining the facts upon the District Court (See also *Harris* v. *Nelson, supra* at 300) in an ordinary civil action the parties must formulate the issues and ascertain the facts with as little supervision from the Court as possible. The procedural formalities are far more complex.

For example, the rules of discovery are applicable (Federal Rules of Civil Procedure, Rules 26-37) and, in essence, serve one of the functions automatically served by the exhaustion requirement of the habeas statute, i.e., formulation and narrowing of issues for determination. Aside from creating a procedural problem for the typical *pro se* plaintiff, the discovery devices also afford an opportunity for abuse simply because incarcerated persons would be delighted by the prospect of requiring persons in authority to answer their questions and do their bidding. Even when a prisoner is represented by counsel in such a case, the relationship between the party and his attorney is such that counsel has less tactical control than in the ordinary civil litigation.

However, the option of proceeding under the Civil Rights Act has even more significant ramifications in terms of when the claims asserted will ultimately be determined. As a practical matter, when a *pro se* complaint is received the State most frequently serves and files an answer. After that the case will lie dormant, often for years. In some cases this may be the result of the plaintiff's ignorance regarding the procedures for putting the case on the

trial calendar or for moving for summary judgment. In other cases the delay simply reflects the fact that the case has become part of the District Court's backlog of civil non-jury cases. Whatever the cause for delay it has been the experience of this office that the typical pro se application for habeas corpus is decided more expeditiously and with less of a burden on the applicant than is the typical civil rights action.

The Implications for Federal-State Relations:

In addition to providing a procedure which is better geared to protecting the interests of the *pro se* litigant, utilization of the habeas corpus remedy serves the principle of comity by means of the exhaustion requirement. That principle has as much relevance in the area of state prison administration as in cases where the original conviction and sentence are being challenged. Indeed, Chief Judge Friendly suggests that it may have more relevance.

And Judges Lumbard, Moore and Hays, dissenting, are so concerned about the impact on federal-state relations of prisoner litigation under the Civil Rights Act that they would require exhaustion of state judicial remedies as a prerequisite to federal review where, as here, such remedies are adequate.*

Traditionally the federal courts have expressed reluctance to intervene in this area except in the most egregious

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* Judge Lumbard correctly points out that in *Houghton* v. *Shafer*, 392 U.S. 639 (1968), a per curiam decision, the record did not show what state judicial remedies were available to review the inmate's claim. This Court merely addressed itself to the question of administrative remedies. See "Exhaustion of State Remedies Under the Civil Rights Act", 68 Colum. L. Rev. 1201 (1968); Note, "Limiting the Section 1983 Action in the wake of *Monroe* v. *Pape*, 82 Harv. L. Rev. 1486 (1969). In *Wilwording* v. *Swenson*, also a per curiam decision, it was clear from the record that the Missouri Courts do not review claims by state prisoners regarding the conditions of their confinement. In the instant cases, state judicial remedies were found to be adequate and available by the three dissenting judges and by Judge Mansfield as well. None of the respondents ever attempted to utilize these remedies.

cases. *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967); *Nieves* v. *LaVallee*, 293 F. 2d 233 (2d Cir. 1961); *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Douglas* v. *Sigler*, 386 F. 2d 684, 688 (8th Cir. 1967); *United States* v. *Marchese*, 341 F. 2d 782, 789 (9th Cir. 1965). It therefore becomes even more important to require that state prisoner complaints be presented by way of a remedy which mitigates the irritation to federal-state relations.*

This consideration has particular relevance for two reasons. First the State has promulgated new and far-reaching regulations relating to discipline procedures as well as other areas of prison administration. It should have the initial opportunity to see that they are being properly implemented.** Second, because of the nature of

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*Respondents argued in the Circuit Court that the exhaustion requirement would not be applicable because historically it was intended to apply only to attacks on the validity of convictions. Apparently, there was no unanimity about this point among the Court. For example, Judge Friendly assumed it would be applicable. Judge Kaufman, on the other hand, viewed the requirement more restrictively. It is clear from this Court's opinion in *Wilwording*, however, that the exhaustion requirement is a prerequisite to both situations.

**Significantly, neither respondents nor the Court below have ever taken into account the fact that the relief typically sought by federal prisoners who challenge a forfeiture of good conduct time (18 U.S.C. § 4161) is habeas corpus (*McKinney* v. *Taylor*, 344 F. 2d 854 [10th Cir. 1965]; *Powell* v. *Hunter*, 172 F. 2d 330 [10th Cir. 1949]; *Sullivan* v. *Ciccone*, 311 F. Supp. 456 [W.D. Mo. 1970]; *Lloyd* v. *Heritage*, 199 F. Supp. 46 [N.D. Ga. 1961]) and that a prerequisite to habeas corpus review in these cases is the exhaustion of available administrative remedies. *Smoake* v. *Willingham*, 359 F. 2d 386 (10th Cir. 1966); *United States ex rel. Weyrich* v. *Parker*, 268 F. Supp. 785 (M.D. Pa. 1967). See also *Light* v. *United States*, 430 F. 2d 932 (5th Cir. 1970) (federal prisoner claiming interference with right to consult with counsel required to exhaust administrative remedies).

In *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944), where a federal prisoner claimed that he had been physically mistreated, the Sixth Circuit held:

"The fact that a person is legally in prison does not prevent the use of habeas corpus to protect his other inherent rights."

It would be illogical to draw a distinction between federal and state prisoner actions in this area.

prison administration, potential litigation arises on a day-to-day basis and is most efficiently handled where the alleged violations occurred.

Judge Mansfield correctly drew attention to the fact that the State Courts are not only indisputably competent to apply federal constitutional principles but also are physically and practically in a better position to do so. With the exception of the Wallkill Correctional Facility, State Supreme Court judges sit on a regular basis at each of the State's correctional facilities to "hear applications for writs of habeas corpus *or other proceedings* regarding detention or confinement." *Wright* v. *McMann*, 321 F. Supp. 127, 130 (N.D.N.Y. 1970). In *Wright* District Judge Foley characterized this as "the acme of judicial service."*

Thus, inmates may present their grievances to a court at the place of their confinement where the relevant records are available and where potential witnesses usually are located. Under this system inmates are in a position to press their claims without the delay occasioned by the geographical obstacles which arise when they seek relief in the federal courts.

Judge Kaufman suggests that the State is no more sensitive to federal jurisdiction in cases involving prisoners' complaints than it is to federal jurisdiction in the areas of education, welfare, public housing and police procedures for search and arrest. We respectfully disagree. The area of prison administration is unique.

The relationship of state prisoners and the officers of the State who supervise their confinement is far more intimate than that of the State and a private citizen. For state prisoners eating, sleeping, dressing, washing, work-

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* This language was not affected by the decision of the Second Circuit which affirmed in part, modified in part and reversed in part the orders of the District Court. (2d Cir., March 16, 1972, St. Sh. Op. 2131).

ing and playing all are done under the color of state "statute, ordinance, regulation, custom or usage" (42 U.S.C. §1983).

Thus, the possibility for Federal litigation is limitless. What for a private citizen would be an altercation with his landlord, a difference with his employer, a dispute with a clothier, an argument with a neighbor, a family feud becomes, for the prisoner, a federal case. *Landman v. Royster*, 333 F. Supp. 621, 644 (E.D. Va. 1971).

The geometric increase in the number of colorable claims which must be formally processed as civil actions bears witness to the validity of the State's concern in this area. In 1970 the number of non-habeas corpus petitions filed by state prisoners in the federal courts increased by 41 per cent over 1969, and by 430 per cent over 1963. *Wilwording v. Swenson*, 439 F. 2d 1331, 1333 n. 3 (8th Cir. 1971).

These numbers also bear witness to the increasing burden on federal courts already plagued by backlogs on the civil calendar. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 428-9 (1971). Judges Feinberg and Oakes argue that this problem is one for the Legislature. We believe, however, that the solution lies not with the Legislature but in the already existing applicable habeas corpus statute.

Respondents have never offered any substantial reason why claims of this nature are not properly treated as habeas corpus but throughout have simply relied upon their fears that if these are habeas corpus and the exhaustion requirement attaches they may never obtain review in the federal courts. That fear is a separate issue and is insufficient to defeat an otherwise valid classification.

The Court below assumes that the claims may be decided under the Civil Rights Act based upon this Court's deci-

sion in *Wilwording* v. *Swenson* which also rests on assumption.

In the instant petition we are asking this Court to examine the validity of this assumption and resolve the question of where state prisoner complaints should be heard.

CONCLUSION

For the foregoing reasons, the instant petition for a writ of certiorari should be granted.

Dated: New York, New York, April 21, 1970.

Respectfully submitted,

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Appendix A.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 889—September Term, 1969; Nos. 255 and 336—September Term, 1970; Nos. 354, 355 and 356—September Term, 1971.

(Argued to the *in banc* court November 4, 1971 decided January 25, 1972.)

Docket Nos. 34567, 35300 and 35253

EUGENE RODRIGUEZ, and the UNITED STATES OF AMERICA *ex rel.* EUGENE RODRIGUEZ,

Petitioner-Appellee,

v.

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLEE, Warden and Chairman of the Prison Board of Clinton State Prison; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTION,

Respondents-Appellants.

UNITED STATES *ex rel.* MICHAEL KATZOFF,

Petitioner-Appellee,

v.

PAUL D. MCGINNIS, Commissioner of Correction of the State of New York and JOHN T. DEEGAN, Warden of Auburn State Prison, Auburn, New York,

Respondents-Appellants.

Appendix A.

JOHN KRITSKY, and UNITED STATES OF AMERICA *ex rel.* JOHN KRITSKY,

Petitioner-Appellee,

v.

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLEE, Warden of Clinton State Prison, NEW YORK STATE BOARD OF PAROLE and NEW YORK STATE DEPARTMENT OF CORRECTION.

Respondents-Appellants.

Before:

FRIENDLY, *Chief Judge,*
LUMBARD, WATERMAN, MOORE, SMITH,
KAUFMAN, HAYS, FEINBERG, MANSFIELD,
MULLIGAN, OAKES and TIMBERS,
Circuit Judges.

The District Court for the Northern District of New York having, by order dated December 23, 1969, directed the release of petitioner Eugene Rodriguez, on the ground that he was unconstitutionally deprived of good behavior time credit, in an opinion reported at 307 F. Supp. 622, and a panel of this court by decision dated March 16, 1971, slip opinions 4745, September Term 1969, having reversed said order by a divided vote;

The District Court for the Northern District of New York having, by order dated August 18, 1970, directed the release of petitioner Michael Katzoff, on the ground that he was unconstitutionally deprived of good behavior time credit, and this court by decision dated March 29, 1971, 441 F.2d 558, having reversed said order by a divided vote;

Appendix A.

The District Court for the Northern District of New York having by order dated June 12, 1970, directed the release of petitioner John Kritsky, on the ground that he was unconstitutionally deprived of good behavior time credit, and this court having heard but not decided the State's appeal therefrom;

This court, by order dated July 19, 1971, having directed that the appeals in such cases be reheard *in banc*, the three appeals being consolidated for argument since they presented the same legal issue, before an *in banc* court which would consist of the judges who should be in active service on the date of decisions along with members of the respective panels who had taken senior status, and the court having received further briefs and heard oral argument, it is

Ordered that the said judgments of the District Court for the Northern District of New York be and they hereby are affirmed upon consideration of the merits and upon the authority of *Wilwording* v. *Swenson*, No. 70-5308, decided by the Supreme Court of the United States on December 14, 1971.

/s/ HENRY J. FRIENDLY
Henry J. Friendly, *Chief Judge*

January 25, 1972.

FRIENDLY, *Chief Judge*, with whom MULLIGAN, *Circuit Judge*, joins concurring:

Although I had previously voted for reversal in these cases, it seemed to me that once *Wilwording* v. *Swenson* was decided by the Supreme Court on December 14, 1971, 40 U.S.L.W. 3277, the proper course for the *in banc* court was to affirm the orders of the district court without writing opinions, and to leave it to the State of New York to assert possible distinctions by petitions for certiorari. Now that

several of my brothers have chosen to dissent in an opinion I feel obliged to explain my own position.

I agree with Judge Lumbard that petitions of state prisoners complaining of the time or conditions of their confinement have the same potentialities for exacerbating federal-state relations as petitions attacking the validity of their confinement—perhaps even more. That federal concern on this score is not limited to challenges to the validity of convictions is evidenced by cases such as *Ex parte Royall*, 117 U.S. 241, 251 (1886), from which the exhaustion requirement sprang, and *Dye* v. *Johnson*, 338 U.S. 864 (1949), *reversing per curiam*, 175 F.2d 250 (3 Cir. 1949). On the other hand, I cannot accept the conclusion that if such petitions are properly viewed as invoking 42 U.S.C. § 1983, a federal court can require exhaustion of state judicial remedies, if these are available. This is not simply because of the Supreme Court pronouncements which, except for the summary dispositions in *Houghton* v. *Shafer*, 392 U.S. 639 (1968) and in *Wilwording* v. *Swenson*, were not in state prisoner cases, but because abstention would mean abdication in any case where the state afforded a fair hearing, whether the proper constitutional standards were applied or not. See *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1963); *Lackawanna Police Benevolent Ass'n* v. *Balen*, 446 F.2d 52 (2 Cir. 1971), and cases there cited.

The right answer, it seems to me, is that, under the broad scope the Supreme Court has given to the "Great Writ" as enacted by the Act of 1867, 14 Stat. 385, all state prisoner petitions complaining of the length or manner of custody, however phrased, are in fact petitions for habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court . . . on the ground that he is in custody in violation of the Constitution or laws of the United States." *Jones* v. *Cunningham*, 371 U.S. 236, 243

(1963); *Walker* v. *Wainwright*, 390 U.S. 335 (1968); *Peyton* v. *Rowe*, 391 U.S. 54 (1968); *Johnson* v. *Avery*, 393 U.S. 483 (1969). If they are, 28 U.S.C. § 2254(b) forbids a federal court from proceeding in the first instance "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner"—an exception sufficiently broad to enable a federal court to look at what the state courts actually do. Because of the inapplicability of *res judicata* in *habeas corpus*, recognition that such petitions are for that remedy also means that an aggrieved prisoner who has not received satisfaction at the hands of a state court can return to the federal court for a "final federal say" concerning the appropriate legal standard, although the federal court will be bound by proper state factual findings. I recognize that a number of cases, including *Houghton* v. *Shafer*, *supra*, and *Jackson* v. *Bishop*, 404 F.2d 571 (8 Cir. 1968), cited by the Court in *Wilwording*, have assumed that state prisoner complaints over the conditions of custody come under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) rather than under 28 U.S.C. § 2254. But the issue was not there raised, and the problem of such prisoner applications had not yet reached its present dimensions.

If this is the correct analysis, I do not understand how a state prisoner who is entitled to relief by *habeas corpus* under 28 U.S.C. § 2254 can opt out of that section, with its attendant requirement of exhaustion of state remedies when these are available, simply by styling his petition as one under the Civil Rights Act. But *Wilwording* seems to indicate that he can. For that reason I am constained to concur in affirming the orders of the district court.

Appendix A.

WATERMAN, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of my brothers Smith, Kaufman, Feinberg and Oakes. And see my statement filed in *Rodrigues* v. *McGinnis et al.* (2 Cir. March 16, 1971).

SMITH, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of my brothers Kaufman, Feinberg and Oakes. As indicated in my dissent to the panel opinion in *Katsof*, 441 F.2d 558, 560, I would not hold that either abstention in deference to the state courts or exhaustion under the requirements of 28 U.S.C. § 2254(b) in *habeas corpus* actions may bar a prisoner from his choice of a federal forum in a civil rights action. I had thought that this was reasonably plain from *McNeese* v. *Board of Education*, 373 U.S. 668, 672 (1963), *Damico* v. *California*, 389 U.S. 416 (1967), *Houghton* v. *Shafer*, 392 U.S. 639 (1968), and our own course in *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971). *Wilwording* v. *Swenson*, —— U.S. ——, Dec. 14, 1971, bolsters that view.

Moreover, I question the desirability of even attempting to lighten our burden by stifling or delaying prisoners' complaints of unconstitutional abuse. It may be an onerous burden, especially in the districts where large state prisons are located. Many petitions are poorly prepared, confusing and mendacious. They do take the time of busy courts. But these cases now before us demonstrate that among them are some of substance, a circumstance which makes the effort worthwhile. It would be far better to provide more assistance in the districts which contain Attica and the other large institutions giving rise to these issues than

to deny redress within the federal court system for deprivation of civil rights.

KAUFMAN, *Circuit Judge* (concurring):

The question which was presented to this court *in banc* is whether a state prisoner must exhaust state judicial remedies before he can bring an action for equitable relief under 42 U.S.C. § 1983, where his complaint charges that state prison officials have deprived him of fundamental personal rights. My unwavering answer to that question was that exhaustion is not required. Moreover, I agreed with Chief Judge Friendly that it was appropriate to dispose of these cases without opinions because of the Supreme Court's clear and unconditional holding in *Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (Dec. 14, 1971). Since my brothers have chosen to file opinions explaining their positions, I believe it is necessary for me to state the reasons for the views I held.

In *Wilwording* the Supreme Court instructed that: "State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." This pronouncement was based on its decisions beginning with *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), where the Supreme Court held that the federal remedy provided by § 1983 "is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *See also McNeese* v. *Board of Education*, 373 U.S. 668 (1963); *Damico* v. *California*, 389 U.S. 416 (1967); *Houghton* v. *Shafer*, 392 U.S. 639 (1968). I note also that *Wilwording* emphasized that the result in no way depended upon the inadequacy of state remedies. Quoting from *Houghton* v. *Shafer*, *id.* at 640, it added: "in 'any event, resort to these remedies is unnecessary.'"

I believe, however, that I should state candidly that I did not construe *Wilwording* as a ground breaking decision. The opinion instead indicates the Court's clear deference to the doctrine of *stare decisis*. *See Monroe* v. *Pape*, 365 U.S. at 192 (Harlan, *J.*, concurring). And it was our adherence to the principles gleaned from the earlier Supreme Court decisions that led us to conclude in our recent *in banc* decision in *Sostre* v. *McGinnis*, 442 F.2d 178, 182 (2d Cir. 1971), that exhaustion of state legal or equitable remedies is not a prerequisite for a state prisoner to maintain a § 1983 action.

I do not intend to argue with statistics indicating that prisoner petitions are on the rise; nor shall I pretend that this condition is pleasing to Judges. But I cannot believe that federal jurisdiction in cases involving prisoner rights is any more offensive to the state than federal jurisdiction in the areas of police procedures for search, arrest and detention, *Monroe* v. *Pape*, *supra*, or education, *McNeese* v. *Board of Education*, *supra*, or welfare, *Damico* v. *California*, *supra*, or public housing, *Holmes* v. *New York City Housing Authority*, 398 F.2d 262 (2d Cir. 1968). I can think of no reason why the question of prison administration should be classified as one of greater or more peculiar state concern than the instances to which I have just referred. In any event, neither of the grounds articulated is a tolerable basis for declining jurisdiction where a prisoner specifically alleges facts indicating a callous disregard of his basic human and constitutional rights, *see Haines* v. *Kerner*, 40 U.S.L.W. 4156 (U.S., Jan. 13, 1972), or for reworking accepted principles of federal jurisdiction in one sweep of the judicial pen.[1]

The Supreme Court's decision in *Wilwording* will not lead to the subversion or circumvention of the *habeas* cor-

[1] I fully agree with my brother Friendly, for the reasons stated in his opinion, that abstention would be wholly inappropriate here.

pre-exhaustion requirement, codified in 28 U.S.C. § 2254(b), which is concerned with prisoner challenges to the validity of state court convictions or sentences. *See Sostre* v. *McGinnis*, 442 F.2d at 182. *See also Fay* v. *Noia*, 372 U.S. 391, 419-20 (1963); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 172-73 (1948). Collateral attack on a final state court adjudication is *toto caelo* from an untried constitutional claim unrelated to a prior proceeding. Under these circumstances, I see no basis for radically expanding the impact of § 2254(b) or, to put it another way, for concluding that Congress intended by that section to carve out an exception to § 1983 for state prisoners challenging an invasion of their constitutional rights during confinement and stating a valid claim for equitable relief. Indeed, the *sua sponte* construction by the Supreme Court of Wilwording's petition as a complaint under § 1983 clearly stimulates that state prisoners alleging deprivation of constitutional rights by prison officials are not forced to mold their claim for relief in the form of a petition for a writ of *habeas corpus*. I find it difficult to believe that the Court, specifically confronted with the alternative modes of pleading, overlooked or did not consider fully the interaction of 28 U.S.C. § 2254(b) and 42 U.S.C. § 1983.[2]

Timbers, *Circuit Judge* (concurring):

I agree with Judges Kaufman and Smith that under the authorities there is simply no basis for requiring these state prisoners to exhaust state judicial remedies as a condition to bringing an action for equitable relief under 42 U.S.C. § 1983. And I further agree with them and with

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[2] I agree with the views expressed by my brothers in their separate concurrences with this opinion.

Chief Judge Friendly that application of the abstention doctrine is not appropriate.

Were those my complete views on these cases, I would resist the temptation to add yet another opinion and would simply concur since my brothers have admirably and succinctly covered those issues. However, there is a further point——perhaps implicit in their opinions—that I believe should be made. If the already over-burdened federal courts are being overwhelmed by frivolous prisoner petitions, it surely is desirable to find some way of coping with that problem in a manner that is nonetheless fair and just to prisoners, whose claims of mistreatment have too often been ignored in the past. But the correct way to reach that result is not for us to indulge in judicial legislation but for Congress to enact an appropriate statute, which could take into account the conflicting policy considerations and could include compromises, limitations and safeguards that we as a court cannot legislate.

MANSFIELD, *Circuit Judge* (concurring):

I concur in Judge Friendly's opinion. I would add that prior to *Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (U.S. Dec. 14, 1971) (*per curiam*), my view was that even though there might be cases where a state prisoner's complaint, purportedly brought pursuant to § 1983, could not be treated as a petition for *habeas corpus*, a federal court, upon its finding that the prisoner was seeking equitable relief and was afforded an adequate state court remedy (as here), had the discretionary power as a court of equity to defer action pending the prisoner's application to the state court for relief. See *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944); *Alabama* v. *United States*, 304 F.2d 583, 590 (5th Cir.), *aff'd. per curiam*, 371 U.S. 37 (1962);

Pugach v. *Dollinger*, 277 F.2d 739, 742 (2d Cir. *en banc* 1960), *aff'd.*, 365 U.S. 458 (1961). Upon the prisoners's showing that the state would not offer a reasonably prompt and fair hearing, on the other hand, the federal court would be required to proceed.

The competence of New York state courts to apply federal constitutional principles is not disputed. In most instances their facilities are closer to the state prison in which the prisoner-plaintiff is located (and where regular state court sessions are held) than is the nearest federal court. Furthermore the state court is in a position to insure greater cooperation on the part of essential state personnel (*e.g.*, local and state police, clerks, sheriffs, court reporters and officers of state and county departments) than is the federal court. For example, unless *Wilwording* is limited, suits for injunctive relief by prisoners of one of New York's largest institutions, Clinton Prison, Dannemora, Clinton County, must be heard by the United States District Court for the Northern District of New York, which is located in Albany, 180 miles away. The single federal judge, with only two holding cells and two deputy marshals at his command, will face the necessity of bringing prisoner-plaintiffs and other prisoner-witnesses on a 360-mile round trip in federal custody. By way of contrast, the New York Supreme Court for Clinton County, with no appreciable calendar problem, is equipped to hold court in a nearby county courthouse or in the prison itself.

The extent to which state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes, often merely with a view to the prisoner's availing himself of the change of scenery offered by federal facilities, is attested to by statistics compiled by the Administrative Office of the United States Courts. The 1971 Annual Report of the Director reveals (Table 14, II-48) that from 1968 to 1971 state prisoners' *habeas corpus* petitions in the United States district courts increased 30%, whereas civil

rights suits increased 170%, and that from 1970 to 1971 such *habeas corpus* petitions declined 7.6%, while such civil rights petitions increased 43.6%.

OAKES, *Circuit Judge* (concurring):

I concur in the affirmance of the judgments below and in the opinions of Judges Smith and Kaufman, agreeing as I do with the original reasoning of Judge Waterman in his dissent in *Rodriguez* v. *McGinnis*, Docket No. 34567 (2d Cir., Mar. 16, 1971), and Judge Smith in his dissent in *Katzoff* v. *McGinnis*, 441 F.2d 558, 560 (2d Cir. 1971). It is not my impression that the federal courts are being overwhelmed with frivolous prisoners' petitions—indeed many have been highly meritorious. But I agree with Judge Feinberg that if the courts were so burdened, judicial legislation is not the appropriate method of meeting the problem.

To the extent that the dissenting opinion of Judge Lumbard and the concurring opinions of Chief Judge Friendly and Judge Mansfield make arguments directed to the Congress that warrant further reply, that reply, it seems to me, may more appropriately be made in some place other than a judicial opinion. To the extent that those same opinions imply a request to the Supreme Court to reconsider and overrule its own line of cases sustaining jurisdiction, the most recent of which may be *Haines* v. *Kerner*, 40 U.S.L.W. 4156 (U.S., Jan. 13, 1972). I would simply register my vehement disagreement.

TIMBERS, *Circuit Judge*, concurs in the opinions of Judges Smith, Kaufman and Feinberg.

Appendix A.

LUMBARD, *Circuit Judge* (dissenting), with whom MOORE and HAYS, *Circuit Judges*, concur:

I dissent.

Three petitioners seek federal [redacted] orders which would direct state prison authorities to take action to correct allegedly unconstitutional treatment.

Michael Katzoff, formerly an inmate of Green Haven Correctional Facility serving a sentence of one to three years for possession of a dangerous weapon, complains that the state acted unconstitutionally in depriving him of good behavior time as punishment for recording offensive remarks in his dairy.

Eugene Rodriguez, formerly an inmate of the Ossining Correctional Facility serving a term of one and one-half to four years for the crimes of perjury and attempted larceny, complains that the state unconstitutionally canceled good time for either possession of contraband or refusal to disclose its source.

John Kritsky, presently an inmate of Clinton Correctional Facility serving a sentence of 15 to 18 years for the crime of armed robbery, complains of unconsitutional deprivation of good time because of his participation in an inmate strike at Auburn Correctional Facility.

All these actions were brought under 42 U.S.C. § 1983, and in each case the district court granted relief to the petitioner. I would reverse the orders of the district courts and remand with directions to stay further proceedings pending a hearing of the claims in the state court.

Prior to *Wilwording* v. *Swenson*, decided December 14, 1971, 40 U.S.L.W. 3277, I had hoped that these three cases could be resolved, consistent with Supreme Court authority, by a requirement of exhaustion of state remedies as a condition precedent to a cause of action in the federal courts under the Civil Rights Act by a state prisoner seek-

ing equitable relief from allegedly unconstitutional prison conditions or sanctions. *Wilwording* suggests the contrary, but it dealt with an inmate in a Missouri prison and Missouri apparently makes no provision for hearing such cases in its courts.[1] I still think there is room to hold that a district court in New York—which does provide an adequate remedy in its courts for the redress of legitimate prisoner complaints[2]—should refrain from hearing such a case until the state court has acted thereon, so long as ongoing physical brutality is not involved, as it was in *Inmates of Attica* v. *Rockefeller*, decided by this court December 1, 1971, slip op. p. 739.

I am not unmindful that what the Court has said per *curiam* in *Wilwording* follows much that was said along the same lines in *Monroe* v. *Pape*, 365 U.S. 167 (1961), *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), *Damico* v. *California*, 389 U.S. 416 (1967), and *Houghton* v. *Shafer*, 392 U.S. 639 (1968). Only in *Houghton*, however, was the petitioner serving a sentence in a state prison, and it does not appear from the record what, if any, remedies were available to Houghton in the Pennsylvania state court. In any event, the Court did not pass on the considerations which seem to me to compel the conclusion that the federal courts should not hear these cases in the first instance where the state courts are ready, willing and able to give relief.

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[1] *See Wilwording* v. *Swenson*, 40 U.S.L.W. 3277 (Dec. 14, 1971).

[2] *See* Civil Rights Law § 79-c, McKinney's Consol. Laws c. 6, which was added in response to this court's decision in *Wright* v. *McMann*, 387 F.2d 519 (1967). This amendment, "remedial in nature, designed to correct an imperfection in the prior law or to provide a remedy for a wrong if none previously existed, is to be liberally construed so as to spread its beneficial results as widely as possible. . . ." *Marcelin* v. *Scott*, 304 N.Y.S. 2d 299, 300-301 App. Div. 1969).

Appendix A.

The resolution of differences between inmates and jailers in state prisons is peculiarly a matter of state interest and concern. These matters can better be determined by the state court which is nearby and available for immediate resolution of such disputes. For some years justices of the Supreme Court of the State of New York, the highest trial court of general jurisdiction, have held court in courtrooms within the confines of the prisons. Thus the petitioning prisoner and any necessary witnesses can be heard with a minimum of risk and expense. By contrast, a hearing in the federal courts requires that prisoners must be moved considerable distances under circumstances presenting a danger of escape and injury to members of the public, to say nothing of substantial expense to the state.

Recent unrest and dissatisfaction in New York state prisons reached a tragic climax at Attica Correctional Facility where a four-day inmate uprising took a death toll of 11 hostages and 32 inmates. Allowing a state prisoner the choice of being heard in a federal court would seem an obvious means of exacerbating relations between state prisoners and their jailers. Obviously the holding of a hearing at a distant federal court is a far greater interruption of prison life and routine than a hearing inside a state prison by a state judge. *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971) *(en banc)*, is a good example of what may frequently be involved in a federal court hearing. That case was tried before Judge Motley in the Southern District of New York during seven days of trial extending from Wednesday, October 29, 1969 to Friday, November 7, 1969. In addition to Sostre, who was brought from Walkill Correctional Facility, Walkill, New York, to testify, two other state prisoners were transported to the hearing from Green Haven Correctional Facility, Stormville, New York. The warden, the food service manager, a doctor, and eleven guards from Green Haven testified. Five guards from Attica Correctional Facility, Attica, New York, testi-

fied, as did one from Clinton Correctional Facility, Dannemora, New York.

If the federal courts must hear these suits and resolve factual issues, it is a clear invitation to state prisoners to frame complaints of alleged mistreatment so that they will, at the least, be afforded some vacation from the tedium of prison life.

It could hardly have been the intention of the Congress in enacting § 1983 that it would be the means whereby state prisoners would place state authorities on trial for the manner in which they were cared for and disciplined in state prisons. But there can be no doubt that it is becoming the fashion for state prisoners to bring these suits. The totals for state prisoner civil rights suits commenced in the federal courts of the Second Circuit for the past six fiscal years[1] tell the story—

1966	21
1967	62
1968	72
1969	138
1970	277
1971	585

All but 38 of the 585 cases filed in 1971 were filed in the four districts of New York. While these totals for state prisoner civil rights suits are still less than those for state prisoner *habeas corpus* petitions in the Second Circuit, which have risen from 571 to 813 in those same years, it should be borne in mind that a very high percentage

[1] These figures are a breakdown of the national totals reported in Table 14 in the 1971 Criminal Report of the Director of the Administrative Office of the United States Courts, prepared by the Division of Information Systems of the Administrative Office.

of the *habeas corpus* petitions can be, and are, disposed of on the face of the petition or after submission of a paper record. By contrast, a very large percentage of Civil Rights Act cases can be disposed of only after a hearing at which the petitioner and others will be produced as witnesses. In the *habeas corpus* cases a record has already been made in the state court, whereas civil rights cases always raise issues which have recently arisen and are wholly undetermined.

It is now quite clear that state prisoners are turning more and more to the Civil Rights Act to redress their grievances and for therapeutic relief, rather than to *habeas corpus*. They not only hope to get an earlier hearing but they also expect a vacation from prison confinement. Unless the district courts can, in the exercise of discretion, stay their hands pending determination of suit in those state courts which will hear the cases, the federal courts will find themselves in the business of running and regulating state prisons.

If the course I propose is followed, certainly it would still be open to the state prisoner to ask the federal court to examine his complaint *de novo*, upon a showing that the state court hearing had not been a full and fair one. *Cf. Townsend* v. *Sain*, 372 U.S. 293 (1963), and 28 U.S.C. §2254(d).

For the above reasons, I would direct the district courts in the three cases before us to stay action until the state court has passed upon the matters complained of by these state prisoners.

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 899—September Term, 1969.

(Argued July 16, 1970 Decided March 16, 1971.)

Docket No. 34567

EUGENE RODRIGUEZ, and the UNITED STATES OF AMERICA *ex rel.* EUGENE RODRIGUEZ,

Plaintiff-Appellee,

—v.—

PAUL D. MCGINNIS, Commissioner of Correction; RUSSELL G. OSWALD, Chairman of the Board of Parole; J. EDWIN LAVALLEE, Warden and Chairman of the Prison Board of Clinton State Prison; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTION,

Defendants-Appellants.

Before:

WATERMAN, MOORE and HAYS,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Northern District of New York, James T. Foley, *Chief Judge*, ordering the reinstatement of 120 days good behavior credit withdrawn from appellee while he was a prisoner in a New York State prison.

Judgment reversed.

Appendix B.

RICHARD A. KOHN, Albany, N. Y., *for Appellee.*
BRENDA SOLOFF, Asst. Attorney General (Louis J. Lefkowitz, Attorney General, Samuel A. Hirshowitz, First Asst. Attorney General, Lillian Z. Cohen, Asst. Attorney General, on the brief), *for Appellant.*

HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Northern District of New York in an action brought by a state prisoner under 28 U.S.C. § 2242 (1964) and 42 U.S.C. § 1983 (1964). After an evidentiary hearing, the district court held that the cancellation by defendants of 120 days of plaintiff's earned good behavior time,[1] was unconstitutionally imposed. The defendant Commissioner of Correction of the State of New York was ordered to restore the remaining period of good behavior time credit to plaintiff. As a consequence of this order plaintiff was released from prison on December 24, 1969, although remaining subject to the supervision of the New York Board of Parole. We reverse the judgment of the district court.

In view of the basis for our disposition, only a brief summary of the facts is necessary. Rodriguez, having been convicted in a New York state court of perjury and attempted grand larceny, was sentenced to imprisonment for an indeterminate term of from one and one-half years to four years. Under New York law, a prisoner serving an indeterminate sentence may elect to participate in a con-

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[1] Credit for such time would have reduced appellee's period of incarceration by 120 days.

ditional release program by which he may earn up to 10 days per month good behavior or time credit toward the reduction of the maximum term of his sentence. Appellee chose to elect this program. Optimally a prisoner so electing may be released under the supervision of the Board of Parole, after having served but two-thirds of his maximum sentence, Correction Law § 803 (McKinney 1968), Penal Law §§ 70.30(4)(a), 70.40(1)(a) and (b) (McKinney 1967); accrued good behavior allowances so earned, however, may at any time be withdrawn in whole or part for bad behavior or for violation of institutional rules. Correction Law § 803(1) (McKinney 1968).

Appellee was charged in two separate disciplinary action reports, dated October 31, 1968, with possession in his cell of five contraband letters written by his wife, and with having six pornographic photographs of his wife in his possession received through illegal channels. The Deputy Warden adjudged that 120 days of the prisoner's earned good behavior time should be cancelled as punishment, "60 days for the letters and 60 days for the pictures." In the "Remarks" section of each judgment was a statement to the effect that appellee had refused to disclose how he had managed to get possession of the uncensored items. The district judge found that this and various other disciplinary actions meted out to Rodriguez (segregation in Sing Sing for a day and a half, segregation in Clinton Prison for several weeks) were really designed to compel these disclosures from appellee. He believed that the imposition of the penalty was a deprivation of Rodriguez' right to due process because the prison regulations prescribed no penalty for refusal to inform. He further found that the Commutation Board at Clinton Prison, which reviews all cases involving forfeiture of good time, failed to comply with a statute directing the Board to forward its

reasons for the disallowance of the good behavior time in writing to the Commissioner of Correction and he characterized this failure as the chief basis for his ruling. Correction Law § 236 (McKinney 1968). We cannot agree with the trial judge's view that questions of constitutional significance are involved.

Even if we were inclined to affirm the decision on the merits we would be compelled to reverse on the ground that appellee has failed to exhaust his state remedies.

Section 2254(b) and (c) of Title 28 U.S.C. require state prisoners who apply for federal habeas corpus to show that they have exhausted state remedies. State prisoners are increasingly resorting to the Civil Rights statutes in order to circumvent the requirements of Section 2254. The present application, since it seeks release from custody, is in fact an application for habeas corpus. "[R]elease from penal custody is not an available remedy under the Civil Rights Act." *Peinado* v. *Ault Authority*, 405 F.2d 1185, 1186 (9th Cir.), cert. denied, 395 U.S. 968 (1969). In *Johnson* v. *Walker*, 317 F.2d 418, 419-20 (5th Cir. 1963) the court said:

> "Use of the Civil Rights Statutes to secure release of persons imprisoned by State Courts would thus have the effect of repealing 28 U.S.C. § 2254; of course, such was not the intent of Congress."

The "chief basis" of the district court's order is founded on error. The provision of § 236 of the Correction Law under which the prison commutation boards forward their reasons for disallowing good behavior time in writing to the Commissioner of Correction is not constitutionally required. Moreover, a letter from Warden Deegan to Commissioner McGinnis dated November 1, 1968 (Defendant's Exhibit "C") was sufficient to satisfy the statutory re-

quirement, since it contained all the information that would have been included in a letter from the Board to the Commissioner. In any case, even if the requirement of § 236 had federal significance, the most that appellee would be entitled to is a decree ordering the board to forward a report to the Commissioner.

Although punishment for refusing to reveal the sources of his contraband would not reflect any constitutional infirmity, it is quite clear that Rodriguez did not lose his good behavior time for refusal to inform but for possession of the contraband. After the punishment was ordered he was given an opportunity to reduce his lost good time credit by revealing the source of the contraband. This procedure, commonly used in law enforcement efforts, certainly does not violate any constitutional right.

The issue in this case is typical of the increasing number of trivial questions of internal prison discipline now being brought, in the first instance, before the federal courts. If the results were not so serious for the administration of justice through state and federal procedures, the spectacle of a federal court of appeals solemnly deciding on the penalty in terms of good time a state prisoner should receive for having dirty pictures in his cell (or for refusing to be a tattle tale) would be so absurd as to be laughable. But if this court entertains actions of this kind it will encourage state prisoners who have any kind of "beef" to bring such actions and the federal courts will end up sitting as prison boards of discipline in the state prisons.

The federal courts should refuse to interfere with internal state prison administration except in the most extreme cases involving a shocking deprivation of fundamental rights. See, e.g., *Church* v. *Hegstrom*, 416 F.2d 449, 450-51 (2d Cir. 1969); *Wright* v. *McMann*, 387 F.2d 519 528 (2d Cir. 1967) (concurring opinion of Lumbard, *Ch.J.*); *Sostre*

v. *McGinnis*, 334 F.2d 906 (2d Cir.), cert. denied, 379 U.S. 892 (1964); *Jackson* v. *Bishop*, 404 F.2d 571, 577 (8th Cir. 1968) (Blackmun, *C.J.*). A case such as the instant one, which is totally devoid of merit, should be dismissed out of hand.

At a minimum such cases should first be filtered through the state prison administrative process and the state courts. In *Wright* v. *McMann*, Chief Judge Lumbard said:

> "We are not called upon this time to decide whether Wright would be heard upon his constitutional claims in federal court without first applying for statutory relief in a state court if the New York legislature had given to inmates of its prisons the right to apply for injunctive relief against improper treatment. I would hold that if a state made provision for such relief in its courts the federal courts should abstain for a reasonable period to allow the state courts to hear the complaint and take appropriate action. I do not agree that recent decisions of the Supreme Court mandate or were intended to mandate action by federal courts in all cases involving the treatment of prisoners in state institutions, without a suitable period of abstention where state courts are empowered to hear the case and where there is reason to believe that the state would grant relief if the complaint were well founded. The disciplining of state prisoners is so peculiarly a matter in the discretion of the state, and the possibilities that prisoners will file groundless and numerous complaints in the federal courts are so obvious, that these cases raise 'special circumstances' that make it appropriate to treat them as an exception to the caveat or policy against abstention by federal courts."

The prisoner should be remanded to serve the sixty odd days remaining of his sentence, or, if he chooses, to make

an application through state administrative or judicial processes for the relief he seeks.

WATERMAN, *Circuit Judge* (dissenting):

I respectfully dissent. I would affirm the judgment entered in the Northern District of New York.

In this action brought by a state prisoner under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, Judge James T. Foley, Chief Judge of the United States District Court for the Northern District of New York, after an evidentiary hearing in which the prisoner and the state officer defendants testified and presented exhibits, adjudged that the cancellation by defendants of 120 days of plaintiff's earned good behavior time which, if not canceled, would have reduced his period of incarceration by 120 days was unconstitutionally imposed. The district judge therefore ordered that the defendant Commissioner of Correction of the State of New York restore the remaining period of good behavior time credit to plaintiff. As a consequence of this order plaintiff, although remaining subject to the supervision of the New York State Board of Parole, was entitled to an immediate release from prison, and he was so released on Christmas Eve, 1969.

The facts are fully set forth in the able opinion filed below by Judge Foley in *Rodriguez* v. *McGinnis*, 307 F. Supp. 627 (N.D.N.Y. 1969), and need to be but briefly reiterated for the purpose of this dissenting opinion.

On February 14, 1967, Rodriguez was sentenced in a New York State court to imprisonment for an indeterminate term of from one and one-half years to four years. According to New York law, a prisoner serving an indeterminate sentence may elect to participate in a conditional release program whereby he may earn up to 10 days per month

good behavior time credit toward the reduction of the maximum term of his sentence. Optimally, under this program, a prisoner may be released, under the supervision of the Board of Parole, from prison incarceration after having served but two-thirds of his maximum sentence, Correction Law § 803, Penal Law §§ 70.30(4)(a), 70.40(1)(a) and (b), but accrued good behavior allowances so earned may at any time be withdrawn in whole or in part for bad behavior or for violation of institutional rules. Correction Law § 803(1). Appellee chose to elect the conditional release program.

On October 30, 1968, while he was imprisoned in Sing Sing, Rodriguez was charged in a "disciplinary action" report with having in his possession five uncensored, and therefore contraband, letters written to him by his wife. He was similarly charged on the following day with having in his possession six uncensored pornographic photographs. These items were taken from him and turned over to the Deputy Warden. On October 31 it was adjudged by the prisoner's interrogator, the Principal Keeper, the Deputy Warden, that 120 days of the prisoner's earned good behavior time were canceled in order to punish him, "60 days for the letters and 60 days for the pictures." The judgment entered on each of the reports set forth that appellee refused to disclose how he managed to get possession of the uncensored items.[1] Judge Foley, upon hear-

[1] The pertinent notations as to the letters follow:

JUDGMENT

60 days. . . .

Remarks: Inmate refuses to disclose who had arranged to get the contraband letters to him.

/s/ R. TREANOR
Deputy Warden

Items held in Warden's office.

(continued on following page)

ing appellee's testimony, discredited the "disciplinary action" reports to the following extent, 307 F. Supp at 631:

> The plaintiff's version given at the trial contradicts these disciplinary reports. He testified he was never confronted with written charges or the contraband. From the beginning, and I also find, the questioning was solely in regard to how he got the uncensored letters and photographs into Sing Sing.

It is clear that, as Judge Foley found, the real motive behind the continuing pattern of punishment, first the cancellation of the 120 days good behavior time earned by a year's good behavior at Sing Sing, second, the immediate incarceration in the "Box" there for a day and a half, and third, the prompt transfer to Clinton Prison following that incarceration, where the confinement in segregation lasted from entry there on November 1 until the first week in December, was not designed to punish Rodriguez for his possession of uncensored mail but rather was designed to compel him to disclose the channel through which he obtained the uncensored items, or, as the majority says, to "tattletale."

Judge Foley also found that the Commutation Board at Clinton Prison, which reviews all cases in which good time has been forfeited by a disciplinary officer, failed to obey the command of the New York statute, and did not forward

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(*footnote continued from previous page*)

The pertinent notations as to the photographs follow:

JUDGMENT

60 days. Inmate was adamant in refusal to disclose method by which the pornographic photographs were passed to him.

Remarks:
Pictures held in Warden's office.

/s/ R. TREANOR
Asst. Superintendent

in writing to the Commissioner of Correction its reasons for withholding appellee's good behavior time. Correction Law §§ 235, 236.

Based on the above, the experienced district judge expressed concern that this pattern of events may well not have comported with "ordinary due process requirements" and stated, . . . I am not sure the disciplinary officer or an officer of a review board can assume legally the investigative mantle and become prosecutor, judge and jury, and in this instance really the Appellate Court of Review." 307 F. Supp. at 632. I share his concern.

The judge indicated, also, that "the chief basis" for his decision was the failure of the prison commutation board to forward the reasons for its action to the Commissioner and that this failure deprived appellee of due process and equal protection of the law. *Id.*

Had Judge Foley found that the prison authorities had only proceeded against Rodriguez by confronting him with a charge of violating prison rules in that he possessed uncensored items, had given him a full opportunity to answer only those charges, and then had failed to forward to the Commissioner of Correction the reasons for taking away good behavior time as punishment for the infractions, I would not consider such a statutory violation to constitute such a deprivation of due process as to warrant a federal tribunal in granting relief. However, on the facts found by Judge Foley, it is my belief that this panel has no other valid option but to conclude that the procedures appellee was subjected to in relation to the uncensored mail did not meet the minimum constitutional requirement of "fundamental fairness."

Rodriguez began his drawn out confrontations with prison officials over a simple infraction of prison rules, the possession of uncensored material. Although he was "officially" charged with that simple infraction, official attention soon focused on Rodriguez's refusal to "tattletale"

and to incriminate others who might have aided him in receiving the contraband.[3] It is apparent from the severity of

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[3] Rodriguez testified as to the initial Sing Sing confrontation as follows:

> I was in the visiting room. My wife was visiting me, and an officer came over and told her that the visit was terminated. She left. I was told to remain. A few minutes later, the officer took me to the Warden's office. . . . The Warden said to me "How did you get these uncensored letters into Sing Sing?"
>
> * * * * *
>
> I told him I had nothing to say. He then summoned somebody else and told him "Take him to the box."

Rodriguez testified with reference to the second confrontation at Sing Sing that he was taken from the box to the Deputy Warden's office by a guard. The colloquy follows:

> He said to me, the first thing he said to me, is "Look, Gene, I know that it is a waste of time asking you anything, but I want to know how uncensored letters got into Sing Sing." I said, "I have nothing to say." He said—he then said, "If you don't tell me I am going to take sixty days for the letters and sixty days for the pictures, to run consecutively." I didn't say anything. He then said, "I can give you back this lost time, give you back all your lost time." I said, "I have nothing to say."
>
> Q. Now is that the end of the conversation with the P.K.? A. That was it.
>
> Q. And how long were you in this room, total time A. Oh, wait, there was something else that was said. He said, "You are being transferred to Clinton." He said, "You are being transferred to Clinton, Gene, tomorrow." I said, "Thanks for telling me." Then he said, "Good luck to you." I said, "Good luck to you." We shook hands and I walked out. I was there two minutes or maybe three minutes.

Upon his arrival at Clinton Prison Rodriguez testified that he was immediately taken away to the box there without any further hearing. As to the confrontations at that prison, Rodriguez testified:

> While I was in the box on three separate occasions the Warden weekly would have me brought up to his office. . . . The Warden would have me brought up to his office and he

(continued on following page)

his punishment, first, the wiping away of a year's accrued credit for a year's good behavior and the resulting assessment of four months additional incarceration, and second, segregation "in the Boxes" of the two prisons for a total of more than 40 days, that the punitive measures were not initiated for possession of uncensored letters and photographs but in order to coerce him to tattletale and to divulge information that would inculpate other residents of Sing Sing.

It would seem, then, that the failure of the commutation board to forward its reasons for its actions was merely a part of the pattern of continued procedural dereliction Judge Foley found, and, as the facts he found are not clearly erroneous, and, on the record, I am not convinced that Judge Foley made any mistake in finding the facts as he found them, I approve the conclusion that he necessarily drew from these facts that the coercive procedures adopted by the prison authorities to obtain Rodriguez's confession did not comport with the due process the accused, then a prisoner in custody, was entitled to.

(*footnote continued from previous page*)

said to me—what he did was this. He said "Sit down." When I sat down he said, "Look, you are an educated man. . . ."

The Court: How often did he do this?

The Witness: He did it three times.

The Court: All right.

The Witness: He did it three consecutive weeks. He said, "Look, you are an educated man." The first time "I want to know how the unauthorized letters got into Sing Sing. I don't like to keep you in the box. You didn't do anything at Clinton but I have to as part of the continuing investigation." I said, "I have nothing to say." He said, "You are going to continue to lose good time and you are going to stay in the box." He said, "We have it narrowed down to two men anyway, so that if you tell us you will save yourself all this aggravation." So I answered him, I said, "Well, if you have it narrowed down to two men, then you don't need me."

So he had me taken out.

Appendix B.

Although not raised before the court below, or considered there, appellee urges us to hold that the imposition of this punishment because he remained silent in the face of interrogation was a violation of his fifth amendment privilege against self-incrimination, citing *Spevack v. Klein*, 385 U.S. 511 (1967). The defendants respond by pointing out that Rodriguez at the hearing before Judge Foley admitted having the uncensored items in his possession and that his refusal to talk was not motivated by any fear of criminal prosecution for possessing the items. This is most assuredly so as to the possession of the contraband, but the prison authorities' questions were not directed at seeking a confession with respect to the contraband; no confession was necessary or needed, he was "caught with the goods." The questions were directed at discovering how the letters and photographs were smuggled past prison censors. The obvious import of the interrogation was the discovery of the identity of the "insider" or "insiders" (prison guards, etc.) who must have enabled Rodriguez to receive the uncensored items. Had Rodriguez answered the prison officials, and implicated certain persons employed by the prison, he would also, of course, be implicating himself in the conspiracy to circumvent censorship and he could reasonably expect further developments to follow any disclosure he might make.[3] The ramifications of the interrogation were twofold. The information sought would not only open the door for a probable criminal charge against a prison official but also, as Rodriguez would also be a party to the official's criminal act, a possible criminal charge against Rodriguez.[4]

Rodriguez may have been motivated to remain silent solely because of a fear of retaliation by his confederate,

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[3] See N.Y. Penal Law § 20.00 and, for example, N.Y. Penal Law § 200.00.

[4] See, e.g., among several penal provisions, N.Y. Penal Law §§ 195.00, 195.05, 200.00, 200.20, 205.20.

whether a prison guard or other prison employee, or even another inmate. But the fifth amendment protection protects irrespective of the subjective motives that prompt one to be silent. If the information sought by officers may tend to incriminate one who is being questioned, he has an absolute right to remain silent. Although "[a]nswers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying," *Gardner* v. *Broderick*, 392 U.S. 273, 276 (1968), (citing cases), no immunity from prosecution was offered in this case to Rodriguez. Nor is it any answer to say that if Rodriguez had talked under the compulsion of the threats of segregation in the box and the loss of good time credits such compulsion would have rendered his statements or the fruits thereof "coerced" and therefore inadmissible against him in a criminal prosecution. See *Garrity* v. *State of New Jersey*, 385 U.S. 493 (1967). Absent an assurance that his statements could not be used against him, we cannot assume appellee was aware of any implicit immunity he would enjoy if criminal charges for a complicity in violation of law were brought against him. Cf. *Gardner* v. *Broderick*, *supra*, at 278-279.

I would point out, therefore, that under the circumstances present in this case the fifth amendment privilege against self-incrimination was a bar to the punishment imposed—punishment which obviously was not imposed for the possession of uncensored letters and photographs but imposed solely for the purpose of compelling appellee to divulge incriminating information. However, the pertinence of the fifth amendment's protection was not brought to the attention of the trial court and I find it unnecessary to uphold the decision below by reliance upon it. With reference to the issue that was presented to Judge Foley, his factual findings are not clearly erroneous and his conclusion drawn therefrom that appellee was deprived of due process seems to me to be incontrovertible. I would affirm.

Appendix C.

EUGENE RODRIGUEZ, and the United States of America ex rel. Eugene Rodriguez, Plaintiff-Petitioner,

v.

PAUL D. MCGINNIS, Commissioner of Correction; Russell G. Oswald, Chairman of the Board of Parole, J. Edwin LaVallee, Warden and Chairman of the Prison Board of Clinton State Prison; New York State Board of Parole; and the New York State Department of Correction, Defendants-Respondents.

No. 69-CV-348.

United States District Court
N. D. New York.
Dec. 23, 1969.

MEMORANDUM—DECISION AND ORDER

JAMES T. FOLEY, Chief Judge.

This typewritten pro se complaint under the Civil Rights statutes is combined with a petition for a writ of habeas corpus. It rarely occurs, but the plaintiff-petitioner forwarded to the Clerk the prescribed statutory fees for filing the complaint and petition. This form of application demonstrates again the ingenuity of state prisoners in following a pattern of a pleading that brought successful results. A similar combined application,—and I had direct contact with the case,—was filed in this Court in Daniel, and U. S. ex rel. Daniel v. McGinnis et al., in 69-CV-118, and was lawyer-prepared by the firm of Rabinowitz, Boudin & Standard, Attorneys in New York City. This same firm recently obtained a preliminary injunction from District Judge Motley, of the Southern District of New York, in Sostre v. Rockefeller et al., 68 Civ. 4058, by decision dated

September 4, 1969, for an inmate of Green Haven Prison, New York, involving a claim based upon 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, statutes upon which jurisdiction for this action is based. Judge Motley stated flatly the Court had jurisdiction. Applying the legal principles to be followed in preliminary injunction applications, she ruled that keeping the plaintiff Sostre in segregation for more than a year on account of disciplinary charges may be totally disproportionate to the offenses charged and thus violative of the Eighth Amendment. It was stated that the plaintiff had demonstrated clear probability of success upon a final determination of the merits. The injunction restrained the Warden from holding the plaintiff in punitive segregation and from depriving him of the rights and privileges of the general prison population until final determination was made. The trial has been held, briefing directed, and the matter is under consideration. In the meantime, I understand the preliminary injunction has been complied with and Sostre was released from segregation. Reference is made to this action and the preliminary ruling to indicate again that no matter the reluctance of the past, it is now settled beyond question that claims of this kind alleging federal constitutional deprivation by State prisoners, if not frivolous on their face, are within the jurisdiction of the federal courts under the Civil Rights Act and must be entertained and determined.

This fact should be recognized and accepted, because there is an increasing volume of judicial writing and comment to this effect. It is clear, as so well stated, that we have come a long way from some earlier attitudes toward rights of prisoners. (Jackson v. Godwin, 5 Cir., 400 F.2d 529.) Our own Circuit in Wright v. McMann, 2 Cir., 387 F.2d 519, at page 522, the noted case that involved a New York prisoner confined in segregation at Clinton Prison, remarked that the older cases retain little vitality;

that there is no longer any question a state prisoner may bring an action under the Civil Rights Act, citing among other cases, Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030; and that the harshest blow to the old "hands-off" doctrine was struck by Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492. It is settled too that the due process and equal protection processes of the Fourteenth Amendment follow prisoners into prison. Washington v. Lee (D.C.N.D.Ala.), 263 F.Supp. 327, 331; aff'd per curiam, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212). The Civil Rights statutes, when relied upon for federal jurisdiction, do not require the exhaustion of state judicial remedies. (Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119, 20 L.Ed.2d 1319; D'Amico v. California, 389 U.S. 416, 88 S.Ct. 526, 19 L.Ed. 647; McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622; Monroe v. Pape, supra; Wright v. McMann, supra, 387 F.2d at p. 524).

Specifically, in this instance, although the Assistant Attorney General tries to convert the complaint into solely a habeas corpus petition that alone, of course, would entail the usual requirement for exhaustion of state remedies, to my mind the habeas corpus petition in the combination here is merely a proper adjunct to insure full relief if the plaintiff prevails in the dominant civil rights claim. (See Bell v. Hood, 327 U.S. 678, 684, 66 S.Ct. 773, 90 L.Ed. 939; Jones v. Peyton (E.D.Va.), 294 F.Supp. 173; United States ex rel. Stuart v. Yeager (D.C.New Jersey), 293 F. Supp. 1079; 28 U.S.C. § 1651). Cases directly in point that sustain in my judgment jurisdiction under the particular, narrow claim and issues raised thereby by this plaintiff-petitioner are: United States ex rel. Campbell v. Pate, 7 Cir., 401 F.2d 55, 57; Landman v. Peyton, 4 Cir., 370 F.2d 135; Sewell v. Pegelow, 4 Cir., 291 F.2d 196).

These federal authorities are set forth not as comprehensive review of all the law on the subject. Such fed-

eral writings are referred to merely to give several examples that there is full recognition by the federal courts that the primary authority and responsibility for prison administration and discipline remains, and should remain, with the State administrative personnel, and that the federal courts are never inclined to reach out to intrude unless,—and this is an important "unless" that New York should recognize,—there is sufficient showing procedures and regulations exist that impair the constitutional rights of prisoners. (Jordan v. Fitzharris (N.D.California), 257 F.Supp. 674, 680; Baxstrom v. Herold, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620; United States ex rel. Schuster v. Herold, 2 Cir., 410 F.2d 1071; cert. den. 396 U.S. 847, 90 S.Ct. 81, 24 L.Ed.2d 96.) This position is no more than a simple, common-sense one that is in accord with the American desire for fairness within its prison systems and such philosophy has been heralded in this day from a variety of sources. The new Chief Justice of the United States, Justice Burger, in an address to the American Bar Association, called for a comprehensive and profound examination into our penal system from beginning to end, and among the details he thought should be examined are the standards and programs for release. (American Bar Association News, Vol. 14, p. 5). Chief Judge Lumbard in his concurring opinion in Wright, supra, 387 F.2d at page 527, referred to—and I think recommended in effect to New York—consideration of the hearing procedures and safeguards set forth in the Task Force Report on Corrections, issued in May 1967 by the President's Commission on Law Enforcement and Administration of Justice. (See also State Prisons and the Free Community, Judge Jiudice, New York State Bar Journal, December 1969, p. 672.)

The President of the United States a short time ago called for consideration of a ten-year program with enormous appropriations to undertake search for improve-

ments in the federal penal system that may become models for state corrections and prison administrators. Undeniably, change is in the air and the handwriting on the wall is big and black for all to see. States are making important changes in regard to promulgation of effective, fair procedures where withholding, forfeiture and restoration of good time is involved. (Burns v. Swenson (D.C.W.D.Missouri), 288 F.Supp. 4.) To its credit, it was developed at the hearing in this action that effective March 1, 1969, the New York State Department of Correction issued "Revised Procedures Covering Disciplinary Matters". Plaintiff's Ex. 8.) Such enlightened approach is heartwarming to this District Court where increasing numbers of civil rights claims of the kind here are being filed by State prisoners.

I am a firm believer that the blemishes and mistakes in the procedures of the past are best corrected from within by adoption of fair and enlightened regulations and institutions bound to withstand attack in any court, and ultimately lead to the reduction of such alleged grievances. The Governor, the Correction Commissioner and the legal advisors for the Commissioner of Correction and the Wardens are the ones to lead the way. The best legal advice is that which anticipates difficulty and counsels the corrective measures that will reduce the challenge. A good example is the statement in Wright, 387 F.2d at p. 528 by Judge Lumbard: "The Attorney General has advised us that whatever may be the truth as to the condition of solitary confinement in a strip cell in 1965 and 1966, such conditions do not now exist." Of course, the Wardens, it seems, must have autonomy and wide authority for on-the-spot decisions but no one would contend that Wardens or their deputies should be permitted to become a law unto themselves. I am aware there is at times a guarded, almost hostile, attitude toward federal court intrusion into certain

aspects of State Prison affairs. That state of mind is unfortunate and the best way, I think, to dispel it is to advise the lay correction officers, whom I have found to be men of integrity and dedication, that new thinking in the law is prevalent and must be followed.

In this action, there is again set forth as an affirmative Second Defense: "The complaint fails to state a claim sufficient to establish the jurisdiction of this Court over the subject-matter." As I have tried to indicate, in my judgment, the defense is untenable and contrary to established law. Further, it is contended that the claim here regarding conditional release is in the same category as a parole problem. However, as so ably pointed out by the appointed attorney for the plaintiff-petitioner, there are solid and clear differences. Conditional release by express New York law is based upon computation of good behavior time and in my judgment is mandatory grant by its terms and nature if the prisoner so behaves. (See Penal Law, McKinney's Consol.Laws, c. 40, 70.-30(4) (a); 70.40(1) (b); 70.40(1) (a). The assertions for the Respondents that to me bear the implication good behavior time credit may be granted or withheld at the pleasure of the Warden and the Prison Commutation Board is answered by rulings in the New York Courts that such discretionary reductions cannot be arbitrarily withheld. (People ex rel. Stark v. Deegan (1968), 56 Misc.2d 567, 289 N.Y.S.2d 285; People ex rel. Roy v. Murphy, 36 Misc.2d 30, 233 N.Y.S.2d 282.) New York Courts have entertained these challenges, and it may be that the doctrine of temporary abstention should be applied to veer these challenges into the State Courts where I think they belong. However, and it is a bleak outlook for this 2-Judge District Court, the trend seems to the contrary. (Wright v. McMann, supra, 387 F.2d pgs. 524-525; McNeese v. Bd. of Education, 373 U.S. 668, 673-674, 83 S.Ct. 1433, 10 L.Ed.2d 622; Zwickler

v. Kootz, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed. 2d 444) Judge Friendly in a very recent writing reviewed the great expanse in the application of civil rights remedies to myriad human problems unthought of in other days (Eisen v. Eastman, 2 Cir., 421 F.2d 560, 11/28/69). Many questions remain unsettled in these actions. In this action my decision which will be adverse to the State provides a vehicle for appeal which I invite and welcome in order that at least some of the questions persistently raised by the State may be answered as correct or incorrect.

The statutes of New York that apply to the grant or withholding of good behavior time are set forth in Section 803 of the New York Correction Law, McKinney's Consol.Laws, c. 43. Such section, subdivision 1, explicitly legislates the requirement that good behavior time credit may be withheld or revoked by the prison board for "bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned." Subdivision 3 of the Section directs the Commissioner of Correction to promulgate rules and regulations in regard to these matters and subdivision 4 says the withholding, forfeiture, cancellation or restoration of such allowances shall be final and shall not be reviewable if made in accordance with law. This subdivision emphasizes for me the right of the Commissioner to be the final authority in these matters if the law is followed and also unquestionably possessing the power to restore the good time as the final administrative reviewing authority. In accord with Section 235 of the Correction Law there is established a Prison Commutation Board with authority to review all cases in which good time has been forfeited by the disciplinary officer and to restore or disallow any such good time revoked. By Section 236 of the Correction Law there is the provision highly important in my judgment in this situation that directs the Board where the allow-

...is withheld to "x forward with their report to the Commissioner of Correction their reasons in writing for such disallowance x". This direction is contained in the Miscellaneous Rules, 60.6(h), Regulations, Def.Ex. F.

In this action a hearing has been held, a satisfactory record made and transcribed. Plaintiff was sentenced in Bronx County to an indeterminate term of one and one-half to four years on February 14, 1967. The plaintiff-petitioner testified and the Head Clerk at Clinton Prison, Dannemora, New York, was the sole witness for the Respondents. There are a number of exhibits in this record that enlighten as to the inmate and employee rules, and the disciplinary and review procedures in the New York prison system. Also several exhibits have direct bearing on the incidents in which the plaintiff was involved and indicate their follow-up and aftermath through the higher echelon of the Correction officials. The plaintiff-petitioner's attack has been narrowed to 120 days good behavior time credit that was taken from him on October 31, 1967, while he was confined in Sing Sing Prison. The separate disciplinary Action reports dated October 31, 1967 (Def.Exs. A, B) charge in one possession of five contraband letters written by his wife in his cell along with other materials, and in the other having six pornographic photographs of his wife in his possession received through illegal channels. The judgment written in each instance is 60 days for a total of 120 days; the brief written comment in one report is plaintiff's refusal to disclose who had arranged to get the contraband into him, the other states he was adamant in refusal to disclose the method by which pornographic materials were passed to him.

The plaintiff's version given at the trial contradicts these disciplinary reports. He testified he was never confronted with written charges or the contraband. From the testimony, and I so find, the questioning was solely in re-

gard to how he got the uncensored letters and photographs into Sing Sing. The punishment effected seems different from the judgment report, inasmuch as the plaintiff says the decision was merely "take him to the Box". (Tr. 29-30.) After a two or three minute oral interview when the plaintiff would not talk, he was told by the Deputy Warden simply, he testified, "I am going to take 60 days for the letters and 60 days for the pictures". (Tr. 31-33.) The following day, plaintiff testified he was then transferred to Clinton Prison at Dannemora, New York, where he was immediately put in and kept in segregation from November to December. (Tr. 36.) The plaintiff testified he was brought before Warden LaVallee several times and told in effect he was an educated man, that the Warden did not like to keep him in the Box although plaintiff did not do anything wrong at Clinton, but he had to be kept there as part of a continuing investigation. (Tr. 44.) Plaintiff testified this pattern continued and when he was brought before the Commutation Board at Clinton Prison, which Warden LaVallee headed, for a review of the forfeiture of his good behavior time, he was again asked only by the Warden if he was going to talk about how letters got into Sing Sing and when he said he had nothing to say, he was told "to get out". (Tr. 51.) The plaintiff's estimate of the time period for this reviewing board appearance was 30 seconds.

These descriptions undisputed except by the two State report Exhibits give cause for concern that approved and short cut procedures did not permit fair hearing or proper consideration to such extent that would accord with ordinary due process requirements. Of course, it is understandable that maximum security prisons must employ subtle methods at times to insure that the security is not broken by devious schemes to get around the regulations promulgated in the interest of the safety of inmates and

correctional personnel. It is also appreciated that summary and swift procedures are necessary to process the day-by-day disciplinary infractions. However, I am not sure the disciplinary officer or an officer of a review board can assume legally the investigative mantle and become prosecutor, judge and jury, and in this instance really the Appellate Court of review. It may be seriously questionable whether refusal to inform can reasonably come under the category of a violation of institutional rules when there is none to such effect. A serious fault, I find, in the reports is that more severe punishment was imposed and inflicted upon the plaintiff than is indicated by the judgment descriptions in them which merely state 60 days loss of good time in each instance.

However, the chief basis for my ruling to uphold the complaint is a complete failure by the prison commutation board to forward as legislatively directed its reasons, in writing, to the Commissioner of Correction for the disallowance of the good behavior time. This board has important responsibilities delegated to it by the New York Legislature because the forfeiture of time assessed by the disciplinary court in the first instance, usually one officer, is merely a recommendation and it is not until the inmate appears before the prison board that the time credit forfeited is actually reviewed and finally assessed in whole or in part. A most important step therefore in these safeguards, of course, is the direction in Section 236 Correction Law that the board forward their reason, in writing, to the Commissioner when a disallowance is upheld in whole or in part. In this record, it is practically admitted that no reasons, in writing, were forwarded to the Commissioner, and I so find. (Tr. 18-20); (see also Pl.Ex. 9 for id.)

My conclusion is that the above omission is substantial and deprived the plaintiff-petitioner of due process

and equal protection of the law. My findings are contained herein. My judgment declared hereby is that the disallowance of 120 days and cancellation of 120 days good behavior credit time is void and unlawful as violative of the provisions of the Fourteenth Amendment of the United States Constitution. The Commissioner of Correction of the State of New York, a named respondent, is hereby directed to restore the remaining period of good behavior time credit to the plaintiff. Such allowance will entitle the plaintiff to release forthwith. The release of the plaintiff, of course, will be to parole supervision as required under New York law. If such release is not accomplished within a reasonable time, the attorney for the plaintiff shall submit a writ of habeas corpus to the effect such release. I hereby acknowledge my deep appreciation for the outstanding legal assistance given by Attorney Kohn to this Court at the hearing and by his competent and thorough briefing in this difficult and important matter. All exhibits I shall file with this decision with the Clerk of this Court.

Judgment shall enter in favor of the plaintiff granting the relief specifically outlined herein, and this decision is the judgment.

It is so ordered.

Appendix D.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 255—September Term, 1970.

(Argued September 17, 1970 Decided March 29, 1971.)

Docket No. 35300

UNITED STATES OF AMERICA, *ex rel.*
MICHAEL KATZOFF,
Petitioner-Appellee,

—v.—

PAUL D. MCGINNIS, Commissioner of Corrections of the State of New York, and JOHN T. DEEGAN, Warden of the Auburn State Prison, Auburn, New York,
Respondents-Appellants.

Before:

FRIENDLY, SMITH and HAYS,
Circuit Judges.

Appeal from a decision and order of the United States District Court for the Northern District of New York, Edmund Port, *Judge,* ordering under 42 U.S.C. § 1983 (1964) the reinstatement of 50 days good behavior credit withdrawn from appellee while he was a prisoner in a New York State prison and directing his release in accordance with the laws and regulations of New York.

Reversed.

Appendix D.

HERMAN SCHWARTZ, Buffalo, New York (Lee Michaels, Auburn, New York, on the brief), *for Appellee.*

LOUIS J. LEFKOWITZ, Attorney General of the State of New York Timothy F. O'Brien, Assistant Attorney General, on the brief), *for Appellants.*

HAYS, *Circuit Judge*:

This is an appeal from an order of the United States District Court for the Northern District of New York in an action brought by a state prisoner under 42 U.S.C. § 1983 (1964). Following an evidentiary hearing, the district court found that the loss of 50 days of appellee's earned good behavior time was unconstitutionally imposed. The appellant Commissioner of Corrections of the State of New York was ordered to credit the 50 days of good behavior time to appellee and appellee was ordered released in accordance with the laws and regulations of New York. We reverse the judgment of the district court.

Appellee Katzoff was sentenced to three years imprisonment following his conviction in a New York State court for illegal possession of a dangerous weapon. Under New York Correction Law § 803 (McKinney 1968 & Supp. 1970) and Penal Law §§ 70.30(4)(2), 70.40(1)(a) and (b) McKinney 1967), prisoners are allowed to participate in a conditional release program by which they may earn up to 10 days per month good behavior time credit toward reduction of the maximum term of their sentences. Optimally, a prisoner so electing may be released under the supervision of the Board of Parole after having served approximately two-thirds of his maximum sentence (i.e., 20 days out of every 30). Good behavior allowances, however, may be

withdrawn at any time in whole or in part for bad behavior or for violation of institutional rules. N. Y. Correction Law § 803(1) (McKinney 1968).

In January 1968 while incarcerated in Green Haven prison, Katzoff's diaries which he was keeping with the knowledge of the prison authorities were taken away from him and examined. Disciplinary charges were brought against him for describing Deputy Commissioner Cain as a "creep" and a "cigar-smoking S.O.B." and for indicating in vulgar language his desire to have sexual intercourse with two nurses at the prison. Deputy Warden Gilligan deprived Katzoff of 30 days good time for these diary entries and confined him in segregation for 57 days. Katzoff ultimately lost 50 days earned good behavior time because of the diary entries—30 days penalty for his remarks as to Deputy Commissioner Cain and 20 days by not being able to earn any good time while in segregation.

The district court ruled, after holding an evidentiary hearing, that there was no regulation against the keeping of a diary (a fact conceded by the State) and that punishment for entries in a private diary violated appellee's constitutional rights to due process, equal protection of the law, and freedom of thought. The court also found that sending appellee to segregation for writing in his diary constituted cruel and unusual punishment and ordered that the prisoner be immediately credited with 50 days earned good time. Since this restoration of good time entitled Katzoff to immediate conditional release, the court on August 18, 1970 ordered entry of a judgment directing the prisoner's release within 2 days. Appellants' application to this court for a stay was denied after appellee agreed in writing that if the district court order were modified or reversed and resulted in additional time to be served, then appellee would surrender to serve such additional time.

We find it unnecessary to consider the merits of appel-

lee's constitutional arguments, for we find that appellee has failed to exhaust his state remedies as required by 28 U.S.C. § 2254(b) (Supp. 1959-1967) and therefore reverse the decision of the district court.

Although the district court stated that it regarded appellee's petition as alleging a violation of his civil rights and asking for a writ of habeas corpus only as incidental to the enforcement of any judgment which might issue, we find that appellee in seeking release from custody was in essence applying for a writ of habeas corpus. There is no basis for limiting the concept of habeas corpus to attacks on custody because of defects in the original conviction as distinguished from a failure to allow release according to law. "[R]elease from a penal custody is not an available remedy under the Civil Rights Act." *Peinado* v. *Adult Authority of Department of Corrections*, 405 F.2d 1185, 1186 (9th Cir.), cert. denied, 395 U.S. 968 (1969); *Johnson* v. *Walker*, 317 F.2d 418, 419-20 (5th Cir. 1963). In our recent opinion in *Rodrigues* v. *McGinnis*, Docket No. 34567, filed March 16, 1971, containing a similar application by a prisoner, we stated that the "present application, since it seeks release from custody, is in fact an application for habeas corpus."

As an application for a writ of habeas corpus, the petition is defective because there is no allegation that appellee exhausted his state remedies in accordance with the requirements of 28 U.S.C. § 2254(b) (Supp. 1959-1967). Katzoff has made no application whatsoever to the state courts, and there is no showing that an adequate state remedy is not available. There is no reason to believe that the New York courts are not fully equipped to decide whether New York prison officials may impose the discipline in question here under New York law (Correction Law § 236 (McKinney 1968)), and the New York and Federal Constitutions. Appellee's argument that the proxim-

ity of the prisoner's release renders state processes ineffective to protect his constitutional rights assumes without justification that state courts will be less responsive to a constitutional claim than the federal courts. There is no authority for the proposition that the proximity of release relieves a prisoner of the exhaustion requirements of Section 2254(b).

Reversed.

Sirica, *Circuit Judge* (dissenting):

I respectfully dissent. I would not bar a civil rights action for failure to exhaust state remedies because of the exhaustion requirement of 28 U.S.C. § 2254(b). The appellant is not attempting to challenge the validity of his sentence as in *Johnson* v. *Walker*, 317 F.2d 418 (5 Cir. 1963) or *Peinado* v. *Adult Authority*, 405 F.2d 1185 (9 Cir. 1969). The recent *in banc* opinion of this court in *Sostre* v. *McGinnis*, —— F.2d —— (2d Cir. 1971), squarely holds that where a state prisoner is deprived of statutory good time as a penalty for his conduct, at least in a case involving first amendment rights, the federal courts have the power to order that it be restored. To make the availability of this remedy turn on the fortuitousness of the prisoner's timing in filing his section 1983 claim makes no sense in terms of either logic or judicial efficiency.

A civil rights plaintiff is entitled to choose a federal forum. If relief such as restoration of good time earned has the incidental effect of entitling him to immediate release, it should not deprive him of that choice. *McNeese* v. *Board of Education*, 373 U.S. 668, 672 (1963); *Bell* v. *Hood*, 327 U.S. 678, 683 (1946); *Damico* v. *California*, 389 U.S. 416 (1967); *Hancock* v. *Avery*, 301 F. Supp. 786 (M.D. Tenn. 1969); *Edwards* v. *Schmidt*, 321 F. Supp. 68 (W.D. Wisc. 1971).

Appendix E.

UNITED DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

70-CV-272

UNITED STATES OF AMERICA, ex rel MICHAEL KATKOFF,

Petitioner

vs.

PAUL D. MC GINNIS, COMMISSIONER OF CORRECTIONS OF THE STATE OF NEW YORK, and JOHN T. DEEGAN, Warden of the Auburn State Prison, Auburn, New York,

Respondents

The following proceedings took place on the 18th day of August, 1970 at the United States District Court, Northern District of New York, Federal Building, Auburn, New York before Hon. Edmund Port, United States District Judge.

Appearances:

MICHAEL KATKOFF, in person and by Lee S. Michaels, Esq., Attorney for Petitioner.

HON. LOUIS J. LEFKOWITZ, by Timothy O'Brien, Esq. of counsel, Attorney for Paul D. Mc Ginnis, etc. The Capitol, Albany, New York.

The Court: I am going to ask the reporter to transcribe the proceedings from this point on, and they will constitute the decision of the Court, the Findings of Fact and the Conclusions of Law, and when the same are transcribed they are to be filed with the Clerk.

Appendix E.

This is a proceeding brought by Michael Katzoff, Petitioner, against Paul D. Mc Ginnis, Commissioner of Corrections and John T. Deegan, Warden of Auburn State Prison. I believe that since the institution of the action, or shortly before the institution of the action, the Correction Law was amended, or it was amended earlier and effective shortly before this time, changing the title of the Warden to Superintendent, and the State Prisons to Correctional Facilities, is that correct, Mr. O'Brien?

Mr. O'Brien: That's correct, Your Honor.

The Court: All right. The title of the action will be considered amended accordingly.

After hearing the testimony, the arguments of counsel and of the parties, on due consideration, the Court makes the following Findings of Fact:

1. The Petitioner is confined in the Correctional Facility at Auburn, New York, formerly known as Auburn State Prison, in execution of a sentence of one to three years imposed by the Supreme Court of New York County on or about June 17, 1968; that at various times since then the Petitioner has been confined in Dannemora State Prison, Green Haven State Prison and Auburn State Prison in execution of the sentence. In addition, the Petitioner was confined in Sing Sing Prison.

It is the practice in the prison system of New York on the admission of an inmate, or shortly thereafter, to prepare an inmate record card, referred to as a warden's card or deputy warden's card, copies of which are kept on file in the warden's office and in the deputy warden's office. As part of that record, and in the early part of the execution of the sentence, the prison authorities determine and post on the card the maximum expiration date and the conditional release date for the particular inmate. In the case of the Petitioner, his maximum expiration date is June 14, 1971. His conditional release

date was fixed as June 14, 1970. That date is the date upon which he will be entitled to conditional release under the provisions of the Penal and Correction Laws of the State of New York if he duly applies for such conditional release.

The Petitioner in this case has duly and timely applied for conditional release.

Throughout a prisoner's incarceration, in the event of disciplinary action taken against him by the institution resulting in a loss of good time, that so-called loss of good time is added to the tentative conditional release date. In the first instance, the institutional procedure provides for a determination of judgment on disciplinary action which is tentative. Those tentative judgments are subsequently reviewed by a Prison Board who make a recommendation to the Commissioner with reference to the restoration of good time which has been tentatively taken away from the prisoner under disciplinary judgments.

The prison or institution Board, to determine the good time allowances to be made to the Petitioner, met on or about February 11, 1970 and made a report to the Commissioner of Correction, a copy of which is designated as Respondents' Exhibit F, and a copy of which was also attached to the petition herein.

During the Petitioner's incarceration on a number of occasions he was disciplined as a result of alleged infractions of prison rules. The disciplinary judgments material to this proceeding all occurred on or about January 7, 1969, or January 9, 1969, except for a judgment on or about September 1, 1968, which resulted in the loss of ten-days good time, and a judgment of March 24, 1969, which resulted in a loss of thirty days good time. The judgments resulting in the loss of good time on those two occasions is not seriously questioned. The ten-day loss of good time with reference to the offense on or about September 1, 1968 of making pass in the visiting room

Appendix E.

was admitted not to be an issue by the Petitioner in open Court. With reference to the offense of pasting a list on an already approved list of books, charged on March 24, 1969, and resulting in the loss of thirty days good time, I find that the charge was properly made, prosecuted and the loss of good time did not result from any violation of any constitutional rights of the Petitioner.

On or about January 7, 1969, the Petitioner was charged while an inmate at Green Haven Prison, the charge is contained in Respondents' Exhibit G and reads as follows—"It is a report to the Warden on a form used by the prison indicated to be GHP and headed 'Disciplinary Action'."

In substance, it charges Katzoff, the Petitioner, with writing a diary containing derogatory statements about the administration of this institution, and making statements in his diary about his sexual desires towards Miss Kelly and Mrs. Pendelton, who are employed here. "It would appear that this inmate would force his attentions on the above-named women if the opportunity would arise."

I find that that charge was made against the Petitioner, that he pleaded guilty to it and that the judgment was that he be confined in segregation, without a stated time limitation, that ninety days of good time was lost or taken away from him, and the diaries were confiscated. As a matter of credibility, the Petitioner from his appearance, general demeanor, background, interest, does not impress the Court. I find that there is no rule or regulation of any of the institutions of the State of New York that prevent the keeping of a diary. I find that this diary was commenced with the prisoner's first incarceration, which I believe was at Sing Sing; that portions of the diary were taken with him from Sing Sing to Dannemora, from Dannemora to Green Haven State Prison before they were confiscated.

Appendix E.

I find that the prison officials subject all entering inmates to a careful scrutiny in addition to their person, to the belongings with which they come. The officials at all of the institutions at which these diaries were maintained knew of the diaries prior to the time that they were confiscated and the time the Petitioner was charged with their maintenance as a violation. There is no evidence that the contents of the Petitioner's diaries was in any way publicized by him or published among the prison population. The recording in the diary on the basis of the proof in this case constituted nothing more than the recording of the thoughts of the Petitioner. The Prison Board, in considering the lost good time assessed for infractions, considered a total of 160 days plus 28 days not earned. The 28 days not earned result from the inability of a prisoner to earn good time under certain conditions, such as being sent to segregation or keep locked, I believe, as a disciplinary measure. Of the 28 days the Petitioner lost on that basis, only 20 days is in issue in this case. The time assessed for infractions of 160 days considered by the Prison Board and on which they made their recommendations to the Commissioner include 30 days loss of time defined on the back of Exhibit F, the report to the Commissioner "Had brother bring in tape recorder that would not be detected by metal detector at gate." I am satisfied that the prison authorities in setting up that charge were referring to the charge made on January 9, 1969 against the prisoner, evidenced by Respondents' Exhibit B. That Exhibit indicates that the charge was "a conspiracy to violate visiting rules," and I am reading, "in that this inmate did conspire (as shown by his own diary) with his brother, Paul, to have brought into the visiting room a recording device and that he did instruct Paul to check with an electronics firm in New York City as to the possibility of obtaining a recording device that could not be

detected by the metal detector at the front gate." The judgment on that charge as recorded on the disciplinary action report is "Brother Paul is removed from visiting and correspondence list."

I am satisfied that the error on the back of the report to the Commissioner in indicating 30 days lost time for that violation results from a misreading of the inmate's record card, also referred to as the warden's card, because the charge that I have just read occupies 2 lines on that card and the 30 days "L/T" is below those 2 lines and opposite an entry headed 1-9-69 VanVlack Writ about Dep. Comm. Cain in Imp. and derog. manner. Thirty days "L.T."

The entry as interpreted in this manner is supported by the disciplinary report, Respondents' Exhibit D, which relates to the charge that I have just read and commences writing about "Dep. Comm. Cain in an imp. derog. manner" and indicates a guilty plea with a judgment of guilty and thirty days lost time. Consequently, I am satisfied that the entry relating to the brother on the back of the report to the Commissioner is an error.

There is no evidence that the diary or that portion of it relating to the derogatory remarks about Deputy Commissioner Cain in which he was called a creep in the diary, was published to any of the prison population.

Mr. O'Brien: Would you mind making a finding with respect to the fact that employees, correction officers of the prison, did however read this information?

The Court: Yes, I so find, and I will give you an opportunity when I am through to supplement the findings.

The important thing with reference to calling the Deputy Commissioner a creep, however, is that there was no reference to that in the report to the Commissioner, that is, that is where the confusion between interpreting the inmate's record card and the individual disciplinary action first arose.

Appendix E.

Pursuant to the judgment relating to the charge of January 7 as indicated in Respondents' Exhibit G, the Petitioner was confined to segregation for approximately two months; that as a result of the two-months confinement in segregation, the Petitioner suffered a loss of twenty days good time.

I may be repeating myself, but at the risk of doing so, the Prison Board met on or about February 11, 1970 and restored 100 days out of 188 days of good time tentatively taken away from the prisoner. They stated as their reason: "Continuous disciplinary reports. See over." I find that in considering the numer of proceedings that are handled, that while the reason is terse, it is adequate to advise the Commissioner of the reason for not restoring all of the good time, or for restoring that part that was restored.

Now I think that covers the factual situation in the case. Do either counsel have any suggested amendments or additions to the proposed order or to the findings as I have just dictated them?

Mr. Michaels: No, your Honor.

Mr. O'Brien: I have no such requests to make.

The Court: All right. Now I am going to the Conclusions of Law.

The Court has jurisdiction of the action pursuant to 42 U. S. Code, Section 1982, 28 U. S. Code, Sections 1343(3), 1651 and 2241, etc.

The petition is being construed with the liberality to which a *pro se* petitioner in prison is entitled. I regard it as a petition alleging a violation of his civil rights and asking for a writ of *habeas corpus* as incidental to the enforcement of any judgment to which he might be entitled if the issuance is necessary.

Due process, of course, is related to the circumstances concerning which it is applied. In the case of prisoners,

recognizing the necessity of the authorities to maintain discipline, recognizing their expertise and recognizing the desirability of avoiding interference with their administration of the prison system, the degree of due process to be applied is of a minimal nature. I feel that the procedural due process under the circumstances, on the basis of the evidence I have heard was not established by the Petitioner to be insufficient.

However, regardless of the amount of due process, procedural due process to which he is entitled, a minimum would require that he not be punished for acts which are not a violation of any prison rule or regulation. I am satisfied that the rules and regulations that govern the management of our penal institutions have been drawn by experts and have been drawn in sufficient detail to cover in some manner any act which would be disruptive of the good discipline, management and purposes of the institution, and when the respondents fail to point to any regulation which is violated, then the person has not been afforded due process under that charge.

In addition, the writing in a diary, unpublished, to my mind is little different than thinking thoughts, I can't conceive of the thinking of any thoughts being the basis of disciplinary action on the part of the prison officials. Assuming that there were regulations that prohibited the keeping of diaries—and I find there are none—segregation for that offense, unpublished, for 60 days would constitute under the decided cases cruel and unusual punishment. As a result, the twenty days that was lost by the Petitioner resulting from the segregation, that was taken from him in violation of his rights to due process and equal protection of the law under the Fourteenth Amendment, to punish him at all for thinking would violate his First Amendment rights.

I conclude that the charge set forth in Exhibit G resulting in 90 days lost time deprives the Petitioner of his

constitutional right to equal protection of the law and due process.

I conclude that the charge concerning writing derogatory matter, in an improper and derogatory manner about Commissioner Cain, and for which 30 days lost time was taken, violates the Petitioner's constitutional rights to due process and equal protection of the law.

I conclude that the Petitioner is entitled to a judgment directing the respondent Commissioner to restore the 90 days lost time—

Mr. O'Brien: It has already been restored, Judge.

The Court: I am aware of that, to restore the 90 days—

Mr. O'Brien: May I ask the purpose of the direction.

The Court: I think it will become clear if you permit me to finish.

Mr. O'Brien: I am sorry.

(The Reporter read back the last paragraph as above recorded.)

The Court: —resulting from the charge set forth in Respondents' Exhibit G and to restore the 20 days lost time which resulted from the two months in segregation imposed as punishment for the charge set forth in Respondents' Exhibit G and for the 30 days lost time imposed as a result of the charge contained in Respondents' Exhibit D.

The determination of the Commissioner that the respondent was entitled to the restoration of 100 days good time—

Mr. O'Brien: The Court please, it is not a determination of the Commissioner, it is a determination of the Prison Communtation Board.

The Court: Well, my understanding is that they merely recommend to the Commissioner.

Mr. O'Brien: No, they do not, the Prison Communtation Board makes the determination and merely sends in a re-

part giving reasons to the Commissioner for such determination. It is not a recommendation.

The Court: Then I will phrase the judgment—the respondents or the officers or agents acting under their authority should be directed to correct the records to reflect the corrections in the loss of good time made in these conclusions. In doing so, it is understood that the respondents have already granted to the Petitioner the 90 days relating to the charges contained in Respondents' Exhibit G—is that your position?

Mr. O'Brien: Well, I don't go along with the Court's—what do you mean?

The Court: I mean it is your position that he shouldn't be credited with the 90 days twice?

Mr. O'Brien: My position is the Court is ruling on something here which doesn't require a ruling.

The Court: I don't want to give him credit for time that he didn't lose twice. Now, is it your position that he has already, by action of the Prison Board, received credit for the 90 days lost time?

Mr. O'Brien: Yes, your Honor, in fact in his petition he asked for a maximum of 40 days, and the Court here is ruling on 90 days, and the proof is undisputed that this 90 days that a disciplinary officer imposed, was wiped out by a Prison Commutation Board.

The Court: All right, if that is the position of the State, of the respondent, then I don't want to confuse the records or give them credit for it more than once.

Mr. Michaels: Your Honor, just so—I conferred with Mr. Katzoff, I believe we could stipulate to that.

The Court: All right, stipulate to what?

Mr. Michaels: That we are talking about the same time that has already been restored to him.

The Court: All right, if it has been restored it has been restored and that is so stipulated?

Mr. Michaels: Yes.

The Court: All right. So that it is stipulated then that the only good time in issue here is the 20 days of lost good time resulting from the confinement in segregation and the 30 days imposed—well, it wasn't 30 days imposed on the conspiracy—the 30 days imposed in relation to Deputy Commissioner Cain.

Mr. Michaels: That is the position of the relator, your Honor.

The Court: Is that correct? If there is any question about it, read the statement back. (The Reporter read back the above statement as recorded.)

Mr. O'Brien: I believe that's right your Honor, 30 days that was imposed upon him for writing these derogatory remarks about Commissioner Cain, that was a punishment wherein 30 days lost time that he had conceivably already earned was taken away from him.

The Court: All right.

Mr. O'Brien: And since the 90 days, the other punishment so far as good time is concerned that was taken away from him, was 90 days for this other activity, combination, I believe, that having been restored, the only other point in issue would be the 20 days that he lost as the result of being in segregation for 60 days and not being able to earn 1 day of good time for every 3 days.

The Court: So what is in issue then is the 20 days, the 90 days and the 30 days, that would be a total of 140 days, and the State's contention is that they have already credited 100 days against that?

Mr. O'Brien: And that has been stipulated to, I believe.

The Court: That has been stipulated, is that correct?

Mr. Michaels: We stipulate to the 90 days—I believe 110 came in as something else, I think the 10 days was picked up from something else.

The Court: That is the 90 and 20, it is 110.

Mr. Michaels: I don't have the Exhibit in front of me. I recall 90 and 10 having been restored, I don't remember where that 10 days was restored from.

Mr. O'Brien: That was the one making the pass, on which there is no dispute, so he got the benefit of that without asking for it.

Mr. Michaels: I agree with your Honor. I don't agree on the exact arithmetic.

The Court: I don't want any equivocation, I want to know what is stipulated so I can draw conclusions. As I understand it now, it is stipulated that the lost time in question is the 20 days of lost time resulting from the segregation, the 90 days of lost time resulting from the charges of Exhibit G and the 30 days of lost time resulting from the charges in Exhibit D, which make a total of 140 days. That 100 days have been credited, leaving 40 days at issue, is that correct?

Mr. Michaels: Yes, we agree with that.

The Court: Is that the stipulation now?

Mr. O'Brien: Well—

The Court: I am not trying to make the stipulation, I am trying to find out what it is.

Mr. O'Brien: Actually, Judge, I am afraid you get a little far afield here, because as far as the restoration, if the Court is relying on this Exhibit here, the 90 days that was restored to him on the back here includes within it the charge of writing a diary containing derogatory remarks about officers and administration officials, and not 30 days as is indicated on this specific single charge.

The Court: No, that charge has 90 days, it fits in with the item. What I am trying to do is sort these items out. The 90-day charge is a 1-7-69 charge. The disciplinary action of 1-7-69 describes that same thing, writing a diary containing derogatory statements about the administration of this institution, and so forth, and it is 90 days. Now that fits the Exhibit G and it fits the warden's card. That 90 days is no problem.

Mr. O'Brien: Of course the State's position here is that these mere notations on the back of this Exhibit here do not have the force and effect of these disciplinary reports.

The Court: That is exactly—

Mr. O'Brien: It is merely a notation made by some clerk to total up the time.

The Court: That is exactly the finding I make. I find that this is an error because it doesn't correspond with specific charges.

Mr. O'Brien: But our position is that even if it is a clerical error it isn't such an error that the Court should consider in arriving at its determination with respect to whether or not this individual has been afforded his rights under the Constitution.

The Court: I am not, except that by putting something on the back of this slip—for instance, the brother, the charge relating to the brother is recorded on the back of this Exhibit as 30 days. Now, I find as a fact that there was no such penalty imposed in relation to the brother. In relation to the brother it says: "Judgment. Brother Paul is removed from visiting and correspondence list."

Mr. O'Brien: What the Court is doing is delving into the record-keeping practices of the New York State Department of Correction and is being very critical and is basing his determination on a typographical or record-keeping practice.

The Court: No, my determination is not based on that.

Mr. O'Brien: Not upon the question of rights.

The Court: Just the contrary.

Mr. O'Brien: It would seem the other way to me.

The Court: Just the contrary. My determination is based on the facts, not the errors, and I am not being critical. If it appears that way, I want to correct the record, because in a prison institution that has the number of proceedings that they have over here in Auburn, if they

made any fewer mistakes it would be a source of wonderment, not if they made more.

Mr. O'Brien: As a matter of fact, during the course of the hearing I think your Honor also discovered that 10 days credit was given to this individual erroneously.

The Court: That's right, and I am not taking that—

Mr. O'Brien: Perhaps the Court should correct that error.

The Court: I will.

Mr. O'Brien: And impose—

The Court: I intend to.

Mr. O'Brien: All right.

The Court: I don't intend to perpetuate errors, that is just what I am trying not to do. Now what I want to know is, to get back to my original question, is that the stipulation, that what is involved here is the 90 days penalty that goes along with Exhibit G. If you refer to the exhibits, I think it will make it easier. In other words, it is the diary charges that I am finding don't constitute a charge.

Mr. O'Brien: But it is this same charge or the punishment therefor that was forgiven *in toto*, that is why I think the Court need not make a determination.

The Court: I am going to make a determination.

Mr. O'Brien: This I don't understand.

The Court: Well, I am not concerned about that. What I am concerned about is whether or not we have got a stipulation here of any kind so that I know what we are stipulating.

Mr. O'Brien: I would be willing to stipulate that insofar as this petitioner is concerned, the only thing that he stands deprived of in respect to time that he was entitled to earn would be a period of 30 days and a period of 20 days. That is all I can see, and I would be willing to stipulate to those items. I won't stipulate that he should get them back.

The Court: No. Well, you are saying exactly what I have been saying right along, 30 and 20 is 50, not 40.

Mr. O'Brien: But you are asking me for a stipulation. I will stipulate to that, too.

The Court: All right. I will add to my findings of fact, in view of counsel's statement, counsel for the respondent, that the Prison Board restored 90 days of good time which was taken away as the result of charges contained in Exhibit G, and in addition, 10 days of good time which was taken away as a result of a charge on or about September 1, 1968 of making a pass in the visiting room, of 10 days; is that the State's contention?

Mr. O'Brien: That's correct, your Honor.

The Court: All right. Then that clears the situation up. Now I will have to—I hate to bore you with a rereading of this, but in order to put it in some kind of sequence I don't know what kind of a judgment I have ordered. Now, will you read that back from where I started to make my conclusions of Law?

(The Reporter read back as directed.)

The Court: All right, now change that and take that out. The colloquy should remain.

On the basis of the stipulation of respondent's counsel that the 90-days good time which was taken away from the prisoner by reason of the charges contained in Exhibit G was restored by action of the Prison Board, it will not be necessary to again restore that good time, although the judgment violated the petitioner's rights, constitutional rights. He is entitled to a judgment directing the restoration of the 30-days lost time resulting from the charges contained in Respondents' Exhibit D for the same reasons that relate to the charges contained in Respondents' Exhibit G. He is also entitled to a judgment restoring the 20-days lost time resulting from his being in segregation for a period of 60 days pursuant to the charges contained in Respondents' Exhibit G. Accordingly, he is

entitled to a judgment requiring the appropriate officials to recompute his lost or his good time and conditional release date, by giving him credit for the 20 days and the 30 days hereinabove referred to.

In determining that release date, the authorities and respondents are not to be bound by an apparent error that was made in calculating his release date as September 2, after giving him 100 days restoration of good time.

The findings of fact should include a finding that the Prison Board determined that the revised release date was September 2, 1970. This was an obvious error in computation. The revised date, according to the testimony should have been September 12.

In order to be more than fair with the prisoner, the prison authorities retained the release date as September 2, 1970, knowing that was an error, by reducing the days of lost time resulting from confinement in segregation from 28 to 18. It is not the intention of the Court to perpetuate any errors, but to have the authorities compute a correct release date based on the credits to which the Court has found the prisoner entitled. According to the Court's computation, by restoring 20-days good time referred to and the 10-days good time referred to, the prisoner would be entitled to conditional release at once, is that correct, Mr. O'Brien? I think it is quite obvious.

Mr. O'Brien: I believe that is correct, your Honor, and even assuming that the 10 days was placed back on.

The Court: I am assuming that.

Mr. O'Brien: Yes, the conditional release date would be the first week in August.

The Court: Some time early in August, yes.

Now let me ask you, it is apparent from what I have said that a judgment should be entered directing his release, that is, on conditional release subject to the provisions of the conditional release forthwith. Now I am appreciative of the fact that you just can't—I assume there is some kind

of processing that has to be done. Now, can that be completed by tomorrow?

(Discussion held off the record.)

The Court: All right then, I will find, I will adjudge that he is entitled to a judgment under which he is entitled to his release forthwith, the judgment to be stayed for not more than 2 days to give the prison officials the opportunity to go through the necessary processing.

I will prepare an order right now and have it served on you. That is what I propose doing. I wouldn't want you to act otherwise.

Now, are there any suggestions in relations to the findings or conclusion?

Mr. O'Brien: I would like to take an exception.

The Court: You are giving an exception to everything I have said from the minute I opened my mouth. You have got an exception to everything I said.

I am wondering if there ought to be any corrections to anything I have said or anything that I have omitted.

Mr. O'Brien: I don't wish to prolong—I don't know whether I will get a hotel room—but I was wondering if your Honor overlooked one of these charges here with respect to conspiracy to smuggle in the tape recorder, and if your Honor would make a finding on that and say that—

The Court: I think I did.

Mr. O'Brien: I don't recall that. Did you find that that was cruel and unusual punishment?

The Court: No, I found that the charge was placed and that the judgment was that brother, Paul, is removed from the visiting and correspondence list in accordance with Respondents' Exhibit B. That was the judgment. On the back of the slip when they referred to it—that is what I was trying to get at, on the back of the report when they referred to 30 days for that violation, it was clearly an error. It doesn't jive with any of the records, but it is an understandable error because the record card is so crowded.

Mr. O'Brien: Well, I know, but with respect to your findings of fact, your Honor has found that writing scurrilous things about a Deputy Commissioner is not a violation of any rule, and may be committed, this act may be committed freely by any inmate of a State prison without the imposition of any penalty therefor, if I understand your finding.

The Court: With reference to the conspiracy to violate the visiting rules, the whole matter is moot because the only punishment imposed—

Mr. O'Brien: I am talking about the writing of scurrilous—you made a specific finding of fact that writing scurrilous remarks in the diary is the same as thinking them.

The Court: That's right.

Mr. O'Brien: And even conceding that prison employees who may see this, and whose morale may be affected by it, for instance, a correction officer may come across a diary which he might have to look into for security purposes, which was done here—

The Court: I don't think I have any such evidence. The only evidence I have got is that they did look at it.

Mr. O'Brien: I don't wish to try the case over, but—

The Court: I made the finding—now a minute ago you were talking about the recording device, that is disposed of because it was moot.

Mr. O'Brien: The bringing of the diary is moot, that was my point.

The Court: No, it isn't, because that related as well to Commissioner Cain. There was an addition of 30 days.

Mr. O'Brien: I would like to request the Court for a two-day stay to enable the respondents to apply to the Second Circuit for a stay.

The Court: I will stay it for 2 days that I have stayed it in order to permit the prison authorities—that is, today is Tuesday, it is stayed until Thursday noon to permit the prison authorities the opportunity to process the prisoner and get him on parole.

Mr. O'Brien: Would your Honor be willing to give us until Thursday noon to make application to the Second Circuit for a stay?

The Court: I don't think you need my permission, but I can't see any need for a stay. The man is going on parole, you can always pull him back.

Mr. O'Brien: Judge Motley stayed her decision.

The Court: I don't think Sostre was ready to get out. I don't think he will be ready to get out for a long time.

Mr. O'Brien: In any event we may apply to the Second Circuit?

The Court: Certainly. If a judge of the Court of Appeals feels this order should be stayed, there is nothing to prevent you from getting a stay. As a matter of fact, I am not as sensitive as the prison authorities, you can do it and call me a few names at the same time.

Mr. O'Brien: We wouldn't do that, but I am wondering if we would have an order to go to the Second Circuit with by Thursday noon.

The Court: I don't know about that. He is on parole. Suppose it was September 2, you would let him out and he would be on parole, and if he violated it you would get him back. If the judgment is to be stayed, I think you have time enough to get it. In any event, I will treat this as an application for a stay and it is denied beyond the time granted.

Now, gentlemen, if I can impose on you for just a few minutes I will go in Chambers and dictate a judgment so that—this will be a very short judgment.

Mr. O'Brien: Like a writ of habeas corpus, I suppose.

The Court: It will be a direction and a judgment and direction so that the officials, so that the warden will have something to act on.

(Discussion held off the record.)

Appendix E.

The Court: Here's what you can do on the exhibits. Let it appear that the attorney for the respondent and prison officials have asked for the original records. I have xeroxed copies which are a little better than the wet copies that you have. I will substitute those for the originals with the understanding that if the originals are needed in the Court of Appeals that they will be supplied, of course. (Thereupon, a short recess was taken after which the hearing was resumed.)

The Court: Let the record show that I am handing to the Clerk for filing an original judgment signed by the Court in this matter, together with a signed copy for filing with the Clerk's office.

The Clerk is directed to file the same. I also have copies for counsel. I want a copy for Mr. Grattan, I want a copy for the Petitioner, 3 additional copies, and I ask you to certify them and then deliver them to the parties now. That should take care of your requirements, Mr. Grattan.

I will direct the Clerk to serve a certified duplicate original copy of the decree on Mr. Grattan, certified copy on counsel for the respondents and a certified copy on the counsel for the Petitioner for the Petitioner's use.

Let the record show that the service was done in accordance with the Court's direction, and we stand adjourned to Chambers.

This is to certify that the foregoing record is a true and accurate transcript of the proceedings had at the time and place noted in the heading hereof.

MARTIN L. MILLER
Official Reporter
United States District Court
Northern District of New York

Appendix F.

John Kritsky, and United States of America ex rel. John Kritsky, Plaintiff-Petitioner,

v.

Paul D. McGinnis, Commissioner of Correction; Russell G. Oswald, Chairman of the Board of Parole, J. Edwin LaVallee, Warden and Chairman of the Prison Board of Clinton State Prison, New York State Board of Parole and New York State Department of Correction, Defendants-Respondents.

No. 69-CV-276.

United States District Court,
N. D. New York.

June 12, 1970.

James T. Foley, Chief Judge.

Memorandum—Decision and Order

The plaintiff filed a handwritten complaint based upon the civil rights statutes and petition for habeas corpus in the same combined form with similar issues as filed in Rodrigues v. McGinnis (N.D.N.Y.—December, 1969) 307 F. Supp. 627, that after trial I ruled upon in favor of Rodrigues. He paid the $15.00 filing fee and thereafter I granted leave to prosecute his action in forma pauperis. Attorney Richard A. Kohn, who appeared for Rodrigues, agreed to act as counsel for plaintiff, for which assistance the Court is again grateful inasmuch as there is no provision for compensation of any kind or reimbursement for expenses. Attorney Kohn represented the plaintiff at the hearing held and submitted a substantial brief in his behalf on the law and facts after the transcript was available. Transcription of the minutes of the hearing understand-

ably took some time and caused delay in the briefing. Two court reporters in this busy two Judge Court, where we have the flow also of other purely federal and important private and government civil and criminal cases as other District Courts do, place substantial burdens upon them in the coverage of our large geographical area to the same extent as it does upon the Judges deluged with state prisoner applications of every kind. Pressures of other work that I thought should be given priority prevented on my part the speedy disposition we try to give State prisoner applications where immediate liberty may be at stake. However, the filing in this Court of a substantial number of civil rights complaints for every grievance imaginable by New York State prisoners in recent years has slowed considerably the disposition within the desired reasonable time. However, in my judgment, the other numerous and substantial cases filed in this District Court in behalf of important private and governmental interests have the right to be processed, heard and decided also with reasonable dispatch. I reaffirm my statements in Rodriguez that it is my firm belief it would best serve the interest of justice and all concerned and be sensible if a little abstention were authorized when proper in the federal courts to allow a fully manned and recognized competent State Court system to hear these civil rights claims that primarily involve State interests, problems and concerns (See Wright v. McMann, 387 F.2d 519, at 528, Chief Judge Lumbard concurring).

A satisfactory hearing in this claim was held and reference herein shall be to the transcript of it. In the complaint, the plaintiff requests a judgment declaring the disallowance of 939 days good behavior time toward the conditional release he elected formally for under certain New York statutory provisions was adjudged in such manner as to violative of constitutional rights of due process and imposing cruel and unusual punishment. (Pl.Ex. 1, §§

230-a, 803(1), N.Y. Correction law (McKinney's Consol. Laws, c. 43, 1968 ed.); New York Penal Law, 70.30(4) (a); 70.40(1), (b), (McKinney's Consol.Laws, c. 40, 1967 ed.).

The position of the Assistant Attorney General in behalf of the defendants is the same as that taken and offered in Rodriguez, supra. The contentions (1) there is not jurisdiction under 28 U.S.C. § 1343(3), as so invoked to entertain the civil rights claim authorized by 42 U.S.C. § 1983, (2) that conditional release is in the same category as parole, being a matter of grace to be withheld at will, are answered in my Rodriguez writing in relation thereto and are adhered to by reference herein. (See also the difference between parole and conditional release—Task Force Report on Correction, issued by the President's Commission on Law Enforcement and Administration of Justice, p. 86). In Rodriguez, I pointed out that New York rulings expressly held that discretionary reductions for good behavior time cannot be arbitrarily withheld. (People ex rel. Stark v. Deegan (1968) 56 Misc.2d 567, 289 N.Y.S.2d 285; People ex rel. Roy v. Murphy (1962) 36 Misc.2d 501, pp. 503-504, 233 N.Y.S.2d 382). Inasmuch as New York seems adamant in arguing need for exhaustion of state remedies and lack of jurisdiction in a problem of this kind concerning loss of good time allegedly disallowed unconstitutionally, appeal is invited again to be expedited that may settle once and for all these questions that by now must be ripe for federal appellate review and rulings. Such appellate guidance will be of great assistance to this District Court in the planning and management of its calendars. (See Sostre v. Rockefeller et al., 312 F.Supp. 863, (S.D.N.Y.—68 Civ. 4058—Motley, J.) decided May 14, 1970).

The challenge of the petitioner who was produced in Albany on a writ of habeas corpus from Clinton Prison, two hundred miles away, was reduced before the hearing

after conference with his attorney from 939 days disallowed to 590 days. This good time disallowance was then narrowed to a single episode, unquestionably a serious one, that occurred in Auburn State Prison during March 1962. Two witnesses testified at the hearing, the plaintiff, who in my judgment was as articulate a witness who could be heard and who gave his version of the serious incident in which he was admittedly involved, and that led to the judgment of the Principal Keeper set forth in Plaintiff Ex. A in this brief fashion: "To Segreg.—1½ years Lost Time". The lost time, or good behavior time credits taken for a year and one-half are computed to be 545 days, and the length of his segregation from March 14 to April 10, 1962 at Auburn and April 10 to July 28, 1962 at Clinton Prison, Dannemora, is the basis for the additional 45 days good time loss in issue. No good time by prison rule is earned while confined in segregation. (Def. Ex. B—Inmate's Rule Book, pp. 4-5). The only other witness, who testified was Francis Ryan, called by the plaintiff, Head Correctional Clerk at Clinton Prison who explained the law and rules and procedures applicable and the internal administrative methods followed by the so-called Prison Commutation Board to comply with the statutory review provision when good time forfeiture is reviewed and not restored (Tr. 75 et seq., §§ 234, 235, 236, N.Y.Corr. Law; 7 N.Y. C.R.R. (Correction—Codes, Rules & Regulation, §§ 1(e). Ryan with a long experience in Prison administration evidenced familiarity with all the procedures and at times as he testified sat when necessary as a member of the Commutation Board and was able to tell the full details of the way it actually operates and arrives at decisions. (See particularly Tr. 96-105.)

The Plaintiff Kritsky was convicted in the former Court of General Sessions of New York County of Robbery First Degree on May 1, 1957. He was sentenced to an indeter-

minate term of 15-18 years. At the time of sentence, he was about 22 years of age and has been now more than 13 years in prison confinement.

The serious incident referred to previously was described by Kritsky in his testimony that stands in every respect uncontradicted in this record by other testimony concerning the circumstances of its happening. It seems that in 1962 the prisoners at Auburn in a protest move that Kritsky said occurred throughout the entire State prison system in an effort to persuade the New York legislature to grant by legislation ten days off the maximum sentence that would enable some prisoners to gain earlier release. (Tr. 28-29). Apparently, this protest later bore fruit and such legislation came into being (See also People ex rel. Clemente v. Warden (1961) 9 N.Y.2d 216, 213 N.Y.S.2d 55, 173 N.E.2d 784). Kritsky characterized the conduct of the prisoners as peaceful and said it consisted only of the prisoners entering and staying in their cells and refusing to come out to go to their work or other type assignments in the daily prison routine. The protest by their action lasted about one and a half days. The prisoners were warned that if they did not come out of their cells by a certain time they would lose one year good time and Kritsky said about ⅞ at Auburn did come out after this warning (Tr. 30). Kritsky came out about an hour later than the deadline, and the next morning went to his work as a clerk in a prison office. However, he testified he noticed many of his friends no longer there, so he went back that afternoon to his cell again contrary to what he was supposed to do. He was taken from the cell five to fifteen minutes later, and was taken to segregation where he was kept for a week to ten days before he came before the Principal Keeper for hearing. Again, I do not intend to minimize the seriousness of this entire affair, no matter how laudable the purposes, because it is evident prison discipline and order

uld be in great peril if protest movements, so common-place and at times upsetting to some in these days, were to be given free rein in prison systems where firmness and application of quick and adequate discipline is clearly an essential to safeguard the security of a large prison and circumvent the start or spread of possible riot and rebellion. No court would want to interfere with these delicate judgments.

However, as grave an intrusion as I think all these are, particularly when made by a federal court into administration of State prisons that do not really entail the cruelty or inhumaneness that shocks everyone, I find that the due process of rights of the plaintiff were violated in the type hearing given plaintiff in 1962. The hearing was held a week or ten days after the protest in a room off the segregation area where plaintiff had been confined with only the Principal Keeper, as the disciplinary authority and judge. The plaintiff's testimony is graphic description:

"A. He (Principal Keeper) advised me that I had been charged with advocating insurrection and a revolution and advocating incendiarism in the prison. He said, 'How do you plead?' I said, 'Not guilty.' He said, 'Eighteen months lost time.'

I attempted to speak—

The Court: Wait a minute. He said, 'How do you plead?'

The Witness: I said, 'Not guilty.'

The Court: All right.

The Witness: I attempted to speak and he interrupted and said, 'That will be all.' And I replied, 'In other words, I am being summarily dismissed.' He said, 'Yes'."

In my judgment, this hearing, and I accept it as truthfully described by the plaintiff, falls far short of the fundamen-

tal fairness expected of due process requirements, no matter the need for summary disposition.

Defendant's Exhibit A, measuring by ruler about 5¼" by 8", is entitled "Disciplinary Action". It contains in most abbreviated form the charges against plaintiff, the substantial judgment rendered against him, and remarks of the disciplinary hearing officer, the Principal Keeper. The remarks without a single reference or elaboration of any kind to person or record concludes "Advocated bloodshed and burning place." There is only a dash in a large space before the word guilty which is difficult to accept as a valid admission of guilt by reason of record regularity in view of the flat contradiction by the plaintiff.

[1-4] Due process is an elusive concept but there is settled satisfactory guides to discern its absence or presence. What is due process depends on the circumstances and it varies with the subject matter and necessities of the situation. (Moyer v. Peabody (Holmes, J.) 212 U.S. 78, 84, 29 S.Ct. 235, 53 L.Ed. 410). A hearing to accord with due process must be given at a meaningful time and in a meaningful manner. (Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62). Under the concepts of the present day, it has been stated the decision maker should state reasons for the determination, indicate the evidence relied upon, and an impartial decision maker is essential. (Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287, 3/23/70). The right to be heard before being condemned to suffer grievous loss of any kind is a principle basic to our society. (Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 95 L.Ed. 817). Applying these principles, I am constrained to rule there was a lack of due process that resulted in grievous loss to plaintiff by reason of continued confinement.

By this ruling, I do agree that in these prison disciplinary procedures there is no need for a full panoply of judicial

due process which was the language and recommendation contained in the Task Force Report on Corrections, issued by the President's Commission on Law Enforcement and Administration of Justice, at p. 13. I would think sufficient and fair the four requisites outlined by Judge Wyzanski in Nolan v. Scafati (D.C.Mass.) 306 F.Supp. 1, 3, for proper procedure before prisoner such as plaintiff is subjected to a serious penalty. (See also Landman v. Peyton (4 Cir. 1966) 370 F.2d 135). The ruling herein is also not to be construed as one to the effect that unrestricted and absolute right to free speech should be accorded prison inmates. (See Whitney v. California (1927) 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095; Roberts v. Pepersack (D.C. Maryland 1966) 256 F.Supp. 415, 428). Prison discipline is essential and certain rights have to be curtailed in order to achieve it. (United States ex rel. Wakeley v. Pennsylvania (D.C.E.D.Pa. 1965) 247 F.Supp. 7).

I also find as in Rodriguez a failure to comply with the statute of New York that directs the prison commutation board to forward its reasons in writing to the Commissioner of Correction for disallowance of good behavior time (N.Y.Correction Law, Section 236). There was a letter from the Warden, to the Commissioner, Def.Ex. C, derogatory to the conduct of plaintiff but it was conceded that this letter was not being offered as strict compliance with Section 236, but was sent for another purpose. (Tr. 102). In my judgment, the record in this case shows the importance this report of reasons might have in relation to the review by Commissioner of the disallowance by the Commutation Board. There is a progress report made by Correction Officer Burke that evaluates the conduct of the plaintiff and his willingness to work attitude in the most praiseworthy terms. (Tr. 107, 108.) Some of the terms are that plaintiff is courteous, cooperative, well behaved with good attitude toward society and authority, who does not need close supervision and was a very exceptional worker. The

appraisal directly contradicts the one contained in the letter of the Warden. Unfortunately, it is established that the Prison Commutation Board ordinarily would not have this progress report of a guard who was in the closest of contact with plaintiff.

My findings of fact are set forth above. My conclusion is that the plaintiff in the imposition of the lost time punishment and segregation was not accorded due process. My judgment declared hereby is that the disallowance of 590 days good behavior time resulting therefrom is void and unlawful as violative of the provisions of the Fourteenth Amendment of the United States Constitution. The Commissioner of Correction, a named defendant, is directed hereby to restore the good behavior time credit to plaintiff; such restoration will entitle plaintiff to release forthwith to parole supervision under his Conditional release election. If plaintiff is not released forthwith, the attorney for plaintiff shall submit a writ of habeas corpus to effect the release. All exhibits shall be filed with this decision in the Clerk's office at Utica.

Judgment shall enter granting the relief to the plaintiff particularly set forth in the above paragraph. This decision constitutes the judgment.

It is so ordered.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1369

RUSSELL G. OSWALD, Commissioner, etc. *et al.*,

Petitioners,

—v.—

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petition for a writ of certiorari seeks review of a judgment entered in this case on January 25, 1972 by the Court of Appeals for the Second Circuit, sitting en banc, reported at 456 F.2d 79, which affirmed three decisions of the United States District Court for the Northern District of New York granting relief under 42 U.S.C. §1983. Both the District Court and the Court of Appeals, sitting en banc, held that the plaintiff-prisoners had been unconstitutionally deprived of good behavior time credits, and that the District Court had jurisdiction to order restoration of the time credits in question.

Statement

Each of the three respondents herein was a prisoner in a New York correctional facility at the time he commenced his action. Each challenged the unconstitutional depriva-

tion of good behavior time credits by prison officials. Hearings were held in the United States District Court, which sustained the claims, and ordered the restoration of the time credits in question. The result of such restorations was that each respondent immediately became eligible for conditional release under applicable state law.

Petitioners appealed in each case, arguing that state prisoners were required to exhaust state judicial remedies before they could be heard in federal court on their claims that prison officials violated their constitutional rights. Following arguments before the Court of Appeals sitting en banc, the Second Circuit, by a 9-3 vote, affirmed the judgments of the District Court, on the authority of this Court's recent decision in *Wilwording* v. *Swenson*, 404 U.S. 249, 92 S. Ct. 407 (1971).

REASONS FOR DENYING THE WRIT

Petitioners are asking this Court to repudiate fundamental and sound principles of federal jurisdiction which it has just reaffirmed in the case of state prisoners who complain that prison officials violated their constitutional rights.

In *Wilwording* v. *Swenson*, 404 U.S. 249, 92 S. Ct. 407 (1971), this Court declared:

> "Petitioners were therefore entitled to have their actions treated as claims for relief under the Civil Rights Acts, not subject, on the basis of their allegations, to exhaustion requirements. The remedy provided by these Acts 'is supplementary to the state remedy, and the latter need not be first sought and

refused before the federal one is invoked.' Monroe v. Pape, 365 U.S. 167, 183, 5 L. Ed. 2d 492, 503, 81 S. Ct. 473 (1961); McNeese v. Board of Education, 373 U.S. 668, 10 L. Ed. 2d 622, 83 S. Ct. 1433 (1963); Damico v. California, 389 U.S. 416, 19 L. Ed. 2d 647, 88 S. Ct. 526 (1967). *State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs.* Houghton v. Shafer, 392 U.S. 639, 20 L. Ed. 2d 1319, 88 S. Ct. 2119 (1968). There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the probable futility of such administrative appeals was noted, we held that in 'any event, resort to these remedies is unnecessary.' Id., at 640." 92 S. Ct. at 409 (emphasis added).

Despite this quite clear language, petitioners are explicitly asking this Court to hold that state prisoners do have lesser rights to a federal forum than other litigants under 42 U.S.C. §1983 and, unlike other litigants, must exhaust state judicial remedies before availing themselves of a federal forum.

Not only is petitioners' contention directly contrary to what this Court said in *Wilwording,* but there is no authority or support for it anywhere. This is because *Wilwording* simply reaffirmed what this Court had said in *Houghton* v. *Shafer,* 392 U.S. 639 (1968), and as early as *Monroe* v. *Pape,* 365 U.S. 167 (1961). Those lower courts that have passed directly on the question have taken the same position. See, e.g., *Edwards* v. *Schmidt,* 321 F. Supp. 68, 77 (W.D. Wis. 1971); *Landman* v. *Royster,* 333 F. Supp. 621, 650-1 (E.D. Va. 1971). *Wilwording* itself was so clear on this point that even those Court of Appeals judges who

were sympathetic to petitioners' position felt the issue was closed and that they had no choice but to affirm.

Nor can petitioners even claim that there is a conflict of circuits on this issue. No other circuit decision is cited in support of the petition and as noted, the few courts that have dealt with the issue have agreed with the court below. See *Landman* v. *Royster, supra; Edwards* v. *Schmidt, supra.* The Second Circuit itself has not heretofore adopted such a rule. Indeed, if petitioners' contention is correct, this Court as well as others, has wrongly taken jurisdiction of a whole host of cases brought by prisoners under 42 U.S.C. §1983, where state remedies were not exhausted. See, *Haines* v. *Kerner,* 404 U.S. ——, 92 Sup. Ct. 594 (U.S. Jan. 13, 1972); *Cruz* v. *Beto,* 404 U.S. ——, 92 Sup. Ct. 1079 (U.S. March 20, 1972); *Cooper* v. *Pate,* 378 U.S. 546 (1964); *Lee* v. *Washington,* 390 U.S. 333 (1968); *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802 (1969).*

On the merits, petitioners' contentions are equally baseless. In the first place, the fact that there is a complaint about the *conditions* of custody (Petition, pp. 18-19) implies nothing about whether that person is illegally "in custody" for purposes of 28 U.S.C. §2254. Indeed, the plain meaning of the phrase would imply that it is limited to attacks on the *fact* of custody, not its *characteristics.*

Secondly, the expanding interpretation of *habeas corpus* (Petition, p. 19) is, of course, irrelevant. In *Wilwording*

* In a footnote, petitioners claim that "the evident confusion of the Court below is typical of the other cases decided within the Second Circuit. See *Oswald, et al.* v. *Gesicki, et al.,* . . . " Petition, p. 18. But as this Court's summary affirmance of the decision in that case indicates, 405 U.S. ——, 40 U.S.L.W. 3537 (May 15, 1972), there is no confusion on this issue anywhere but in the petition.

itself, the Court first noted that *habeas corpus* was appropriate, and then added that the Civil Rights Act was *also* available, thereby explicitly indicating that in prisoners' rights cases, the availability of *habeas* does not, contrary to petitioners' contentions, preclude a Civil Rights Act proceeding without exhaustion.

Thirdly, there is no point to distinguishing between "good time" cases and others (Petition, p. 20), for the same issues of constitutional deprivation will be raised in both types of cases. For example, a suit challenging unlawful denial of good time can also seek damages, or declaratory relief. See, e.g., *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971), cert. denied sub nom., *Sostre* v. *Oswald*, 404 U.S. —, 92 S. Ct. 719 (1972). To require exhaustion for the "good time" issue but not for the damages claim seems illogical. Petitioner apparently recognizes this, since it does not really press this distinction, though mentioning it briefly. See Petition, p. 20.

Petitioners' views on the superiority of *habeas corpus* to 42 U.S.C. §1983 for the *prisoner* (Petition, pp. 21-24), seems refuted by the respondents' and other prisoners' frequent recourse to the latter. As for the impact on federal-state relations (Petition, pp. 24-28), the short answer is that the Federal Civil Rights Act is designed to ensure that the Constitution will be observed by state officials. The tragic history of the American prison system and the few judicial responses for change, e.g., *Haines* v. *Kerner*, *supra*; *Cruz* v. *Beto*, *supra*; *Lee* v. *Washington*, *supra*; *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Wright* v. *McMann*, 387 F.2d 519 (2nd Cir. 1967) *on remand* 321 F. Supp. 127 (N.D.N.Y. 1970), *aff'd in part, rev'd in part, mod. in part* — F.2d —— (2d Cir. 3/16/72)—reflect the great need for a federal presence.

Moreover, in New York at least, there is *no* adequate state damages remedy, for under New York Civ. Rts. L. §§79 and 79-c, state prisoners may not sue for they are civilly dead. See *Green* v. *State*, 278 N.Y. 15, 14 N. E. 2d 883 (1938); *Hewson* v. *State*, 27 A.D.2d 358, 279 N.Y.S.2d 790 (1967). An exhaustion requirement will thus deprive prisoners of a federal forum and offer them little or nothing in return.

In sum, petitioner is asking this Court to repudiate an unbroken and recently reaffirmed line of decisions, and especially this Court's recent statement that "state prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." *Wilwording* v. *Swenson*, *supra*. This repudiation is urged in the absence of any inter-circuit conflict and for no sound policy considerations.

CONCLUSION

For the foregoing reasons, respondents pray that the petition for writ of certiorari be denied.

Respectfully submitted,

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Topical Index

	Page
Interests of Amici Curiae	1
Summary of argument	2
Argument	3
A Federal Court in a civil rights action has no power to order the release of a state prisoner confined under a state criminal judgment	3
Conclusion	10

Table of Authorities Cited

Cases	Pages
Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), cert. denied, 403 U.S. 908 (1971)	7
Darr v. Burford, 339 U.S. 200 (1950)	3
Denney v. State of Kansas, 436 F.2d 587 (10th Cir. 1971)	6
Ex parte Door, 44 U.S. (3 How.) 103 (1845)	4
Fay v. Noia, 372 U.S. 391 (1963)	3, 4
Gaito v. Ellenbogen, 425 F.2d 845 (3d Cir. 1970)	6
Gaito v. Strauss, 249 F.Supp. 923 (W.D.Pa. 1966), aff'd on other grounds, 368 F.2d 787 (3d Cir. 1966), cert. denied 386 U.S. 977 (1967)	5
Gilmore v. Gordon, 422 F.2d 860 (9th Cir.), cert. denied, 400 U.S. 837, rehearing denied, 400 U.S. 954 (1970)	7
Goss v. Illinois, 312 F.2d 257 (7th Cir. 1963)	5
Harris v. Nelson, 394 U.S. 286 (1969)	7
Howard v. Rolufs, 338 F.Supp. 697 (E.D.Mo. 1972)	6

Page

Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963) 6

Kaufman v. Moss, 420 F.2d 1270 (3d Cir.), cert. denied, 400 U.S. 846 (1970) 5

Metros v. United States District Court for Dist. of Colo., 441 F.2d 313 (10th Cir. 1970) 5
Moore v. Frazier, 316 F.Supp. 318 (D.Neb. 1970) 6
Morrissey v. Brewer, 406 U.S. ___, 92 S.Ct. 2593 (1972) .. 4

Ney v. State of California, 439 F.2d 1285 (9th Cir. 1971) . 7

Peinado v. Adult Authority of Dept. of Corr., 405 F.2d 1185 (9th Cir.), cert. denied, 395 U.S. 968 (1969) 6
Picard v. Conner, 404 U.S. 270 (1971) 4
Pierson v. Ray, 386 U.S. 547 (1967) 7

Silver v. Dickson, 403 F.2d 642 (9th Cir. 1968), cert. denied, 394 U.S. 990 (1969) 7
Smartt v. Avery, 411 F.2d 408 (6th Cir. 1969) 6
Smith v. Logan, 311 F.Supp. 898 (W.D.Va. 1970) 6
Still v. Nichols, 412 F.2d 778 (1st Cir. 1969) 6

Younger v. Harris, 401 U.S. 37 (1971) 7

Statutes

28 U.S.C.:
Sections 2241-2254 4
Section 2241(c)(3) 4
Section 2254 4

42 U.S.C.:
Section 1983 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *Petitioners,*

VS.

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE PEOPLE OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF AMICUS CURIAE

The question presented in this case as stated by the State of New York in its petition for certiorari is as follows:

> "Should state prisoners have the option of challenging the conditions of their confinement by means of the Civil Rights Act when there exists an appropriate remedy by way of habeas corpus?"

Although we do not view the issue this broadly, we are vitally interested in this case since we believe its outcome will significantly influence the volume and character of federal litigation by our state prisoners seeking release from custody under their state criminal judgments. We are hopeful of a result which will both avoid superfluous litigation and permit the resolution, insofar as possible, of questions relating to the custody of our state prisoners in our state courts. We are persuaded that both of these interests will be served by a decision by this Court requiring such prisoner litigation to be pursued in federal habeas proceedings.

SUMMARY OF ARGUMENT

The decision below is erroneous since it permits a state prisoner to use an action under the Civil Rights Act to determine the validity of his custody under a state criminal judgment and to secure his release from confinement. The correct and exclusive federal forum for such an action is a federal habeas proceeding. A federal court in a civil rights action has no power to order the release of a prisoner confined under a state criminal judgment. This conclusion is implicit in the various rationales which are relied upon in numerous decisions rejecting efforts by state prisoners to secure damages or injunctive relief in civil rights actions on the ground their custody is unlawful. Moreover,

this conclusion is consistent with the traditional considerations of comity which govern federal intervention into the state criminal processes. If accepted by this Court, it will significantly reduce the burden upon the federal courts by resolving issues relating to the custody of state prisoners, at least initially, in the state courts.

ARGUMENT

A FEDERAL COURT IN A CIVIL RIGHTS ACTION HAS NO POWER TO ORDER THE RELEASE OF A STATE PRISONER CONFINED UNDER A STATE CRIMINAL JUDGMENT.

The salient issue before this Court is whether a state prisoner may use an action under the Civil Rights Act, Title 42, United States Code section 1983, as a means of securing his release from custody under a state criminal judgment. The prisoner litigants each challenged administrative determinations disallowing them a certain number of good conduct time credits against their sentences. In their district court litigation all three received favorable decisions on the merits resulting in restoration of the disputed credits and their release from confinement. These district court judgments and the in banc decision of the Circuit Court of Appeals which affirms them are erroneous since a federal court has no power to grant such relief in an action under the Civil Rights Act.

The power of a federal court to order the release of a state prisoner confined pursuant to a state criminal judgment is dependent upon an express Congressional grant of power. *Fay v. Noia*, 372 U.S. 391, 409, 415 (1963); *Darr v. Burford*, 339 U.S. 200, 204 (1950)

overruled in other respects in Fay v. Noia, supra, 435-36; *Ex parte Dorr,* 44 U.S. (3 How.) 103 (1845). This power clearly exists in an action under the federal Habeas Corpus Statutes, Title 28, United States Code sections 2241-2254. But, in the habeas statutes, the traditional considerations of comity which inhibit federal intervention into the criminal processes of the states are expressed not only in a codification of the exhaustion requirement, but in a direction to afford to a state court factual finding a presumption of correctness when certain conditions are met. 28 U.S.C. §2254; see *Picard v. Conner,* 404 U.S. 270 (1971).

Since these prisoner litigants sought release from state custody which they alleged violated the federal Constitution, they could have sought relief in a federal habeas proceeding. 28 U.S.C. §2241(c)(3). Their cases are essentially similar to those brought by state prisoners who challenge state administrative actions revoking their paroles. There can be no question that a habeas proceeding is the correct federal forum for a state prisoner who would contest his parole revocation. See *Morrissey v. Brewer,* 406 U.S. ....., 92 S.Ct. 2593 (1972).

The position we now urge is that a state prisoner, who may litigate in a federal habeas proceeding an issue relating to the validity of his custody under a state criminal judgment, is foreclosed from litigating the same issue in a federal civil rights action. This is the conclusion which we find implicit in the decisions of a number of courts which have refused to consider such issues in actions under the Civil Rights Act. The

various rationales given by these courts for refusing to permit such litigation all point to a more basic reason which is simply that a federal court in a civil rights action has no power to determine the validity of a state criminal judgment or to order the prisoner's release from confinement under it.

One rationale which has been used to foreclose federal inquiry in a civil rights action into the validity of a state criminal judgment is the doctrine of res judicata. In *Goss v. State of Illinois*, 312 F.2d 257 (7th Cir. 1963), the court held that the Civil Rights Act did not confer jurisdiction upon a federal district court to review a state criminal contempt conviction which had been affirmed by the Illinois Supreme Court. While the doctrine of res judicata will not foreclose federal inquiry in a habeas proceeding, the doctrine is applicable to an action brought under the Civil Rights Act. See, *e.g.*, *Kaufman v. Moss*, 420 F. 2d 1270, 1273-74 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970); *Metros v. United States District Court for Dist. of Colo.*, 441 F.2d 313, 315-17 (10th Cir. 1970); *Gaito v. Strauss*, 249 F.Supp. 923, 933-34 (W.D.Pa. 1966), *aff'd on other grounds*, 368 F.2d 787 (3d Cir. 1966), *cert. denied*, 386 U.S. 977 (1967).

Perhaps the rationale most frequently cited in decisions rejecting efforts by state prisoners to secure their release from custody in actions under the Civil Rights Act is that doing so would permit circumvention of the federal habeas exhaustion requirement. This rationale has been utilized when the effort is one to attack the validity of a state criminal conviction.

See, *e.g.*, *Gaito v. Ellenbogen*, 425 F.2d 845, 848 (3d Cir. 1970); *Johnson v. Walker*, 317 F.2d 418, 419-20 (5th Cir. 1963); *Denney v. State of Kansas*, 436 F.2d 587, 588 (10th Cir. 1971). It has also been used when the effort is one to challenge a parole revocation. See, *e.g.*, *Still v. Nichols*, 412 F.2d 778, 779 (1st Cir. 1969); *Smartt v. Avery*, 411 F.2d 408, 409 (6th Cir. 1969); *Peinado v. Adult Authority of Dept. of Corr.*, 405 F.2d 1185, 1186 (9th Cir.), *cert. denied*, 395 U.S. 968 (1969). This concept most frequently appears in cases where the prisoner seeks equitable relief but it has also been used to foreclose an action for damages. See, *e.g.*, *Gaito v. Ellenbogen*, *supra*, 848-49; *Still v. Nichols*, *supra*, 779; *Smith v. Logan*, 311 F.Supp. 896, 899 (W.D.Va. 1970); *Howard v. Rolufs*, 338 F.Supp. 697 (E.D.Mo. 1972).

Prematurity is another rationale which has been used to preclude a state prisoner from using a federal civil rights action to contest the validity of his custody under a state criminal judgment. This is expressed in some cases as a refusal to permit the prisoner to proceed with his suit until he has secured a determination in a conventional post-conviction proceeding that his custody is unlawful. See, *e.g.*, *Still v. Nichols*, *supra*, 779; *Smith v. Logan*, *supra*, 899. As one court pointed out, it would be improvident for a federal court to entertain a suit for damages for confinement under a state criminal conviction while the plaintiff is still in prison on that conviction. *Smith v. Logan*, *supra*, 899; see also *Moore v. Frazier*, 316 F.Supp. 318, 320-21 (D.Neb. 1970).

Insofar as a civil rights plaintiff seeks equitable relief against the enforcement of a criminal judgment, he encounters the basic doctrine that a court of equity should not act when the moving party has an adequate remedy at law. *Cf. Younger v. Harris,* 401 U.S. 37, 43-44 (1971). This doctrine is particularly persuasive in this context since the remedy which is available in federal habeas is one which can resolve the issues more expeditiously than an action under the Civil Rights Act. Not only are the procedural formalities less complex, but it permits the litigants to be protected from the potential for harassment which exists in the discovery techniques available in a civil rights action. See *Harris v. Nelson,* 394 U.S. 286 (1969).

When a civil rights plaintiff seeks damages for an allegedly unconstitutional conviction or sentence, he is frequently foreclosed by an immunity defense. This defense has been successfully asserted by judges, *Pierson v. Ray,* 386 U.S. 547 (1967); by prosecutors, *Ney v. State of California,* 439 F.2d 1285, 1287 (9th Cir. 1971); and by probation officers, *Burkes v. Callion,* 433 F.2d 318 (9th Cir. 1970), *cert. denied,* 403 U.S. 908 (1971). The defense of immunity has also been held to shield members of a parole board from a suit for damages under the Civil Rights Act for revoking a parole. See, *e.g., Silver v. Dickson,* 403 F.2d 642 (9th Cir. 1968), *cert. denied,* 394 U.S. 990 (1969); *Gilmore v. Gordon,* 422 F.2d 860 (9th Cir.), *cert. denied,* 400 U.S. 837, *rehearing denied,* 400 U.S. 954 (1970).

Thus, a state prisoner who seeks injunctive relief or damages in an action under the Civil Rights Act predicated on a claim that his state criminal judgment is invalid will be foreclosed for any one of the following reasons. First, that the validity of his state criminal conviction was determined during his state trial and that determination is res judicata in his civil rights action. Second, that he cannot use an action under the Civil Rights Act to circumvent the federal habeas requirement that he exhaust his available state remedies. Third, that his civil rights action is premature until he has successfully attacked his state criminal judgment in a conventional post-conviction proceeding. Fourth, that insofar as he seeks equitable relief, he has an available remedy at law in habeas corpus. And, fifth, that insofar as he seeks damages, the defendants are protected from his suit by an immunity defense. Each of these reasons points to the inevitable conclusion that a federal court in a civil rights action has no power to determine the validity of a state criminal judgment or to order the release of a prisoner confined under it.

The same conclusion must be reached when a state prisoner in an action under the Civil Rights Act seeks injunctive relief or damages predicated on a claim that an administrative decision revoking his parole or disallowing his good conduct time credits renders his confinement federally impermissible. The issue central to his cause of action—the validity of his custody—is available to him in a federal habeas proceeding. Thus, he should not be permitted to use

an action under the Civil Rights Act to circumvent the federal habeas requirement that he exhaust his available state remedies. Similarly, his action is premature until he has successfully attacked his state custody in a conventional post-conviction proceeding. Also, insofar as he seeks equitable relief, he has an available remedy in federal habeas corpus. Moreover, the immunity considerations which would shield a judge or a probation officer from a suit for damages under the Civil Rights Act are similarly persuasive when asserted by administrative officials such as parole board members who act in a quasi-judicial capacity. Only the doctrine of res judicata presents a significant variation since the defendants can rely on this defense only if the issue has first been litigated to judgment. Thus, if an action under the Civil Rights Act is held to be an appropriate forum for litigation such as this, a state prisoner could not only circumvent litigating his issues in a state court but would be encouraged to do so.

We submit therefore that the decision below is erroneous. The appropriate forum for resolving the issues raised by the state prisoner litigants is a federal habeas proceeding. We urge this Court to so hold and, in doing so, to state definitively that when a state prisoner has an available forum in a federal habeas proceeding for litigating an issue relating to his custody under a state criminal judgment, he is foreclosed from litigating the same issue in a civil rights action. We are persuaded that this is a result which both recognizes the limitations on the power

of a federal court in a civil rights action and conforms to the comity considerations which pervade the entire area of federal intervention into the criminal processes of the states. Moreover, it will significantly reduce the burden on the federal courts by permitting questions concerning the custody of state prisoners to be resolved, at least initially, in the state courts.

CONCLUSION

For the foregoing reasons, we respectfully urge that the judgment of the United States Court of Appeals for the Second Circuit affirming the district court judgments in these three cases should be reversed.

Dated, San Francisco, California,
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SEP 11 1972

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

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TABLE OF CONTENTS

	PAGE
Opinions and Orders Below	1
Jurisdiction	2
Question Presented	2
Statutes	2
Statement	5
The *In Banc* Opinions	10
Summary of Argument	16
POINT I—The habeas corpus statute is specifically applicable to state prisoners and tailored to their litigation needs. That statute—and not the inmate or local federal court—should determine how their claims relating to confinement are reviewed, particularly since the habeas corpus remedy respects the valid concerns of the state in reviewing all prisoner claims	18
A. If state prisoners may ignore the habeas corpus remedy and bring their claims regarding confinement directly to the federal courts under the Civil Rights Act, they have the power of unilaterally overriding the State's interest in first reviewing such claims	25
B. The state prisoner who proceeds under the Civil Rights Act in order to escape application of the exhaustion requirement sacrifices the protections available to him under the habeas corpus statute	35
POINT II—Respondents have failed to exhaust their available and adequate State Court remedies	41
Exhibit "A"	1a
Exhibit "B"	4a

Cases Cited

PAGE

Appalachian Volunteers, Inc. v. *Clark*, 432 F.2d 530 (6th Cir. 1970), cert. denied 401 U.S. 939 (1971) 30

Bivens v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) 35

Brabson v. *Wilkins*, 19 N.Y. 2d 449 (1971) 46

Brooks v. *Wainwright*, 428 F.2d 652 (5th Cir. 1970) 34

Carafas v. *La Vallee*, 391 U.S. 234 (1968) 17, 19

Carothers v. *Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970) 25

Coffin v. *Reichard*, 143 F.2d 443 (6th Cir. 1944) 21

Cupp v. *Swenson*, 288 F. Supp. (W.D. Mo. 1968) 31

Daugherty v. *Craven*, 422 F.2d 7 (9th Cir.), cert. denied 397 U.S. 964 (1970) 21

Douglas v. *Sigler*, 386 F.2d 684 (8th Cir. 1967) 25

Dowd v. *United States ex rel. Cook*, 340 U.S. 206 (1951) 19

Edwards v. *Schmidt*, 321 F. Supp. 68 (D.C. Wis. 1971) 26, 28

Ex Parte Kieffer, 40 F. 399 (C.C.D. Kan. 1889) 45

Ex Parte Royall, 117 U.S. 241 (1886) 26, 27

Fay v. *Noia*, 372 U.S. 391 (1963) 22

Gaito v. *Ellenbogen*, 425 F.2d 845 (3d Cir. 1970) 39

Gomez v. *Miller*, 341 F. Supp. 323 (S.D.N.Y. 1972), jurisdictional statement filed sub nom. *Miller* v. *Gomez*, 41 U.S.L.W. 3102 ..... 20, 24

Grayson v. *Montgomery*, 421 F.2d 1306 (1st Cir. 1970) 22

Hanvey v. *Pinto*, 441 F.2d 1154 (3d Cir. 1971) 34

Harris v. *Nelson*, 394 U.S. 286 (1969) 37, 38

PAGE

Hall v. Garner, 309 F. Supp. 362 (E.D. Ark. 1970) ... 25

Howard v. Swenson, 426 F.2d 277 (8th Cir. 1970) 34

Ilas v. Ellis, 264 F. Supp. 185 (S.D. Ind. 1967) 45

In re Ferguson, 361 P.2d 417 (1961) 28

In re Harrell, 470 P.2d 640 (1970) 28

In re Riddle, 372 P.2d 304 (1962) 28

Jackson v. Denno, 378 U.S. 368 (1964) 47

Jackson v. Hendrick, —— D. and C. 2d—— (Ct. of Com. Pleas, Phila. Co., April 7, 1972), 40 U.S.L.W. 2710 (May 2, 1972) 29

Jones v. Headly, 410 F.2d 325 (5th Cir. 1969) 39

Johnson v. Avery, 393 U.S. 483 (1969) 20

Johnson v. Avery, 252 F.Supp. 783 (M.D. Tenn. 1966) 23, 24, 25

Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963) 39

Jones v. Cunningham, 371 U.S. 236 (1963) 17, 19

Jones v. Decker, 436 F.2d 955 (5th Cir. 1970) 19, 24

King v. McGinnis, 289 F.Supp. 466 (S.D.N.Y. 1968) .. 34

Kritsky and United States ex rel. Kritsky v. McGinnis, 313 F.Supp. 1247 (N.D.N.Y. 1970) 2

Lambert v. Department of Corrections, —— F.Supp. ——, Civil No. 71-1185 (D.C.S.C. April 12, 1972) 29

Landman v. Royster, 333 F.Supp. 621 (E.D. Va. 1971) 20, 25, 34

Light v. United States, 430 F.2d 932 (5th Cir. 1970) 32

Lloyd v. Heritage, 199 F.Supp. 46 (N.D. Ga. 1961) 32

Marcellin v. Scott, 33 A.D.2d 588 (3d Dept. 1969) 30, 42

Marcucci v. Mancusi, 443 F.2d 921 (2d Cir. 1970) 25

PAGE

Matter of Brown v. *McGinnis*, 10 N.Y. 2d 531 (1962) ..42, 46

McKinney v. *Taylor*, 344 F.2d 854 (10th Cir. 1965) 32

Minnesota v. *Brundage*, 180 U.S. 499 (1901) 45

Mitchell v. *Schoonfield*, 285 F. Supp. 728 (D.C. Md. 1968) 43, 45

Morris v. *Travisono*, 310 F.Supp. 857 (D.R.I. 1970) .. 31

Morris v. *Wingo*, 421 F. 2d 651 (6th Cir. 1970) 21

Morrisey v. *Brewer*, —— U.S. ——, 92 S.Ct. 2593 (1972) 21

Muniz v. *United States*, 374 U.S. 150 (1963) 41

Murphy v. *Turner*, 526 F.2d 422 (10th Cir. 1970) 21

Negrich v. *Hohn*, 246 F.Supp. 173 (W.D. Pa. 1965) .. 40

Nelson v. *George*, 399 U.S. 224 (1970) 20

Paden v. *United States*, 430 F.2d 882 (5th Cir. 1970) .. 32

People v. *Bonino*, 1 N.Y. 2d 752 (1956) 47

People v. *Cornish*, 21 A.D. 2d 280 (1st Dept. 1964) 47

People v. *Huntley*, 15 N.Y. 2d 72 (1965) 47

People v. *Ressler*, 17 N.Y. 2d 174 (1966) 47

People ex rel. Brown v. *Johnston*, 9 N.Y. 2d 482 (1961) 46

People ex rel. Keitt v. *McMann*, 18 N.Y. 2d 257 (1966) . 42

People ex rel. Menechino v. *Warden*, 27 N.Y. 2d 449 (1971) 46

Peyton v. *Rowe*, 391 U.S. 54 (1968) 20, 35

Picard v. *Connor*, 404 U.S. 270 (1971) 16, 41

Pierce v. *La Vallee*, 293 F.2d 233 (2d Cir. 1961) 25

Potwora v. *Dillon*, 386 F.2d 74 (2d Cir. 1967) 39

PAGE

Powell v. *Hunter*, 172 F.2d 331 (10th Cir. 1949) 32

Rodriguez and United States ex rel. Rodriguez v. *McGinnis*, 456 F.2d 79 (2d Cir. 1972) (in banc) .. 1

Rodriguez and United States ex rel. Rodriguez v. *McGinnis*, 451 F.2d 730 (2d Cir. 1971) 1

Rodriguez and United States ex rel. Rodriguez v. *McGinnis*, 307 F. Supp. 627 (N.D.N.Y. 1969) 1

Sellers v. *Department of Corrections*, —— F. Supp. ——, Civil No. 71—1161 (D.C.S.C. March 28, 1972) 29

Shaw v. *McGinnis*, 14 N.Y.2d 864 (1964) 42

Smartt v. *Avery*, 411 F.2d 408 (6th Cir. 1969) 21, 24

Smoake v. *Willingham*, 359 F.2d 386 (10th Cir. 1966)..32, 45

Sostre v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971) (in banc), cert. denied sub nom. *Oswald* v. *Sostre*, 404 U.S. 1049 (1972) 24, 31

State ex rel. Thomas v. *State*, 198 N.W. 2d 675 (Sup. Ct. Wis. 1972) 29

Strowder v. *Shovlin*, 380 F.2d 370 (3d Cir. 1967) 20

Sullivan v. *Ciccone*, 311 F. Supp. 456 (W.D. Mo. 1970) 32

Townsend v. *Sain*, 372 U.S. 293 (1963) 37

United States v. *Marchese*, 341 F.2d 782 (9th Cir. 1965) 25

United States ex rel. Caminito v. *Murphy*, 222 F.2d 698 (2d Cir. 1955) 47

United States ex rel. Campbell v. *Pate*, 401 F.2d 55 (7th Cir. 1969) 24

United States ex rel. Hetenyi v. *Wilkins*, 348 F.2d 844 (2d Cir. 1965), cert. denied sub nom. *Mancusi* v. *Hetenyi*, 383 U.S. 913 47

PAGE

United States ex rel. Katzoff v. *McGinnis*, 441 F.2d 558 (2d Cir. 1971) 2

United States ex rel. LaNear v. *LaVallee*, 306 F.2d 417 (2d Cir. 1962) 47

United States ex rel. Meadows v. *New York*, 426 F.2d 1176 (2d Cir. 1970) 30

United States ex rel. Schuster v. *Herold*, 410 F.2d 1071 (2d Cir. 1969), cert. denied 396 U.S. 847 .....20, 24

United States ex rel. Stuart v. *Yeager*, 293 F.Supp. 1079 (D.C.N.J. 1968) 34

United States ex rel. Weyrauch v. *Parker*, 268 F.Supp. 785 (M.D. Pa. 1965) 32, 45

United States ex rel. Zevin v. *Cahn*, 282 F.Supp. 275 (E.D.N.Y. 1968) 45

Westberry v. *Fisher*, 309 F. Supp. 12 (S.D. Me. 1970) 40

Wilwording v. *Swenson*, 404 U.S. 249 (1971) 17, 18, 22, 23, 26, 42

Wilwording v. *Swenson*, 439 F.2d 1331 (8th Cir. 1971) 34

Wright v. *McMann*, 387 F.2d 519 (2d Cir. 1967) ...25, 30, 33, 39, 40

Wright v. *McMann*, 321 F.Supp. 127 (N.D.N.Y. 1970), aff'd. in part, rev'd. in part, 460 F.2d 126 (2d Cir. 1972) 32

Younger v. *Harris*, 401 U.S. 37 (1971) 25, 27

STATUTES AND REGULATIONS CITED

18 U.S.C. § 4161 32

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2241 2

28 U.S.C. § 2243 .....3, 16

PAGE

28 U.S.C. § 2254 ..... 4, 16, 18, 23, 36, 41, 43

42 U.S.C. § 1983 ..... 5, 16, 33

Fed. R. Civ. Pro. 26-37 37

N.Y. Correction Law § 236 5

N.Y. Civil Practice Law and Rules, Art. 78 42

N.Y. Civil Rights Law § 79-c 30, 42

7 N.Y. Code, Rules and Regulations § 261.3(b) 43

7 N.Y. Code, Rules and Regulations § 60.1(d) (repealed Oct. 19, 1970) 43

MISCELLANEOUS

"Developments in the Law—Federal Habeas Corpus", 83 Harv. L. Rev. 1038 (1970) 20, 26

Goldfarb and Singer, "Redressing Prisoners' Grievances", 39 Geo. Wash. L. Rev. 175 (1970) 17

Jacob, "Prison Discipline and Inmate Rights", 5 Harv. Civ. Rights L. Rev. 227 (1970) 21

Note, "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts", 72 Yale L. J. 506 (1963) 17

Note, "Constitutional Rights of Prisoners. The Developing Law", 110 U. Pa. L. Rev. 985 (1962) ... 17

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: "Corrections" (1967) 34

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

BRIEF FOR PETITIONERS

Opinions and Orders Below

The *in banc* decision of the Court of Appeals is reported at 456 F. 2d 79 and is reproduced in the Appendix commencing at page 113a. The order to *in banc* is set forth in the Appendix at page 112a.

The decision of the panel which initially decided the *Rodriguez* case is reported at 451 F. 2d 730. It is reproduced in the Appendix commencing at page 28a. The District Court opinion in *Rodriguez* is reported at 307 F. Supp. 627 and is included in the Appendix commencing at page 18a.

The opinion of the Second Circuit panel which initially decided the *Katzoff* case is reported at 441 F. 2d 558 and is included in the Appendix commencing at page 84a. The District Court opinion in *Katzoff* has not been officially reported. A copy is included in the Appendix commencing at page 62a.

No decision was rendered by the panel which heard the appeal in the *Kritsky* case. The opinion of the District Court is reported at 313 F. Supp. 1247 and is reproduced in the Appendix commencing at page 104a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on January 25, 1972. The petition for certiorari was filed on April 24, 1972. Certiorari was granted on June 19, 1972.

Question Presented

Should State prisoners have the option of challenging the conditions of their confinement by means of the Civil Rights Act when there exists an appropriate remedy by way of habeas corpus?

Statutes

28 U.S.C. § 2241:

"Power to grant writ:

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * *

(3) He is in custody in violation of the constitution or laws or treaties of the United States . . ."

28 U.S.C. § 2243:

"Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

28 U.S.C. § 2254:

"State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * *

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under

the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

42 U.S.C. § 1983:

"Civil Action For Deprivation of Rights

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

New York Correction Law § 236:

"In all cases . . . where the [prison commutation] board shall withhold the allowance of the whole or any part of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, they shall forward with their report to the commissioner of correction their reasons in writing, for such disallowance. The action of the board in granting or withholding reductions shall be deemed a judicial function and shall not be reviewable if done according to law."

Statement

Each of the respondents herein was confined in a correctional facility of the State of New York at the time he

commenced his *pro se* action in the federal courts. Each filed a combined civil rights complaint and petition for a writ of habeas corpus seeking his release from prison without previously seeking relief in the State Courts. Each asserted that he had been unconstitutionally deprived of his conditional release from prison by the action of the defendants in disallowing him a certain number of good conduct time credits, which action allegedly represented cruel and inhuman punishment. None of the respondents challenged the validity of his conviction or the sentence imposed.

A hearing was held in each case at which the respondents were represented by counsel. All three respondents received a favorable decision on the merits, resulting in the restoration of the disputed credits and immediate release from physical confinement. According to the records of the New York State Department of Correctional Services, the sentences of respondents Rodriguez and Katzoff have run. The maximum expiration date of respondent Kritsky is February 22, 1975.

Rodriguez

The underlying claim made by respondent Rodriguez in the District Court was that the determination disallowing the good conduct time in question was made without adequate notice and hearing and therefore violated his right to due process. At the District Court hearing he acknowledged that he had been charged with the possession of certain contraband letters and photographs which he admitted having received but asserted that he was not punished for this but because he refused to tell prison authorities how he had received the contraband correspondence.

In granting relief the District Court preliminarily held that the action brought by respondent was an action under the Civil Rights Act and that the habeas corpus aspect was "merely a proper adjunct to insure full relief" in

the event the respondent sustained his underlying claim. Therefore, respondent was not required to exhaust his state court remedies (20a).

The District Court accepted respondent's version of the summary procedures by which the determination was reached and found that the questioning by prison officials was solely in regard to how he got the uncensored materials into Sing Sing (25a). However, the Court made no specific finding that the assessment of time was a consequence of the refusal to inform. Although the Court expressed concern with the summary procedures employed, the decision specifically turned on the failure of the Prison Commutation Board to comply with the requirement of § 236 of the New York Correctional Law that it advise the Commissioner of Correction in writing of its reasons for upholding the disallowance of good behavior time. He deemed this omission "substantial" and held that it deprived respondent of both due process and equal protection of the law (27a).

On appeal the Second Circuit reversed the decision by a vote of 2 to 1. The majority rejected the District Court's "view that questions of constitutional significance are involved" (31a) concluding that (a) Correction Law § 236 is not constitutionally required and (b) respondent was not punished for the refusal to inform and, moreover, even if he had been, this would not have been unconstitutional (31a-32a). The Court held that, in any event, the decision was reversible because respondent Rodriguez had failed to exhaust his state court remedies as required by 28 U.S.C. § 2254(b) and (c).

Judge Waterman, dissenting, concluded that the record below demonstrated that the punishment was based on the refusal to inform, that this violated Rodriguez' constitutional rights and that while the violation of the Correction Law, standing alone, was not unconstitutional, it became so in the context of all that had occurred (37-38a).

Katzoff

Respondent Katzoff lost 50 days credit as a result of making derogatory comments about prison officials in his diary. He challenged the actions of prison officials as (1) having been taken without meeting the requirements of due process, (2) constituting cruel and inhuman punishment and (3) violating his rights under the First Amendment.

The District Court found that no rule or regulation barred the keeping of a diary; that the institution was aware that respondent Katzoff was keeping a diary and that there was no evidence that the contents of the diary were in any way made public to other inmates (65a).

The Court found as a matter of law that the petition was in the nature of a civil rights action and that the issuance of a writ of habeas corpus was only incidental as a means of enforcing the judgment (68a). While the procedure followed did not violate due process, punishment for acts not amounting to a violation of any institution rule did amount to such a violation. The Court further found that assuming such a regulation existed, the punishment of respondent for his unpublished comments by placing him in segregation with the accompanying loss of good time credit violated his rights under the First and Fourteenth Amendments (69a).

The Court directed the restoration of the time in issue and ordered respondent's immediate release.

A panel of the Second Circuit reversed the District Court by a vote of 2 to 1 without considering the merits on the ground that respondent Katzoff had failed to exhaust his remedies as required by 28 U.S.C. § 2254(b). The Court found that respondent was seeking release from custody and therefore, in essence, seeking habeas corpus relief.

> "There is no basis for limiting the concept of habeas corpus to attacks on custody because of defects in the original conviction as distinguished from a failure to

allow release according to law. '[R]elease from a penal custody is not an available remedy under the Civil Rights Act.' " (87a)

The Court rejected an argument that state remedies were inadequate because of the proximity of the release date as assuming

"without justification that state courts will be less responsive to a constitutional claim than the federal courts. There is no authority for the proposition that the proximity of release relieves a prisoner of the exhaustion requirements of Section 2254(b)." (88a)

Judge Smith dissented stating that this was not habeas corpus since the conviction and sentence were not being challenged. He cited the Circuit Court's opinion in *Sostre v. McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (*in banc*), cert. denied sub nom. *Oswald* v. *Sostre*, 404 U.S. 1049 (1972) as allowing a civil rights action to seek restoration of good time, at least in a case of First Amendment rights and concluded that the fact that the restoration of credits resulted in release should not deprive an inmate of a federal forum under the Civil Rights Act. (88a)

Kritsky

The forfeiture of time in respondent Kritsky's case followed an institution-wide demonstration by the inmates of Auburn Correctional Facility in 1962. Respondent Kritsky claimed that he was charged with being a leader in the demonstration and that, in summary proceedings at which he pleaded not guilty, he was assessed 18 months good time credits. At the hearing in the District Court he acknowledged that he had participated in the demonstration and that if he had come out of his cell the first day and stayed out he would not have lost any time. However, the following day, instead of going to his job he voluntarily returned to his cell and stayed there in further protest.

After noting both the serious nature of the incident leading to the time disallowance and respondent Kritsky's acknowledgment that he was involved in it, the District Court held that the disciplinary hearing given him violated his right to due process (107-108a). The Court also determined that the Prison Commutation Board had not filed written reasons with the Commissioner for disallowing the time as required by § 236 of the New York Correction Law (110a). Accordingly, the Court directed that the time credits in issue be restored and ordered respondent's immediate release.

An appeal was argued before a panel of the Second Circuit but no decision had been reached as of the time that the three cases herein were ordered to be heard *in banc*.

The *In Banc* Opinions

Petitions for rehearing were denied by the respective panels which heard *Rodriguez* and *Katzoff*, on July 19, 1971 with Judge Waterman dissenting in *Rodriguez* and Judge Smith dissenting in *Katzoff*. At the request of the petitioners and of these judges a majority of the judges in active service voted for reconsideration in these cases *in banc* and, further, for initial consideration *in banc* of the *Kritsky* case, all three cases to be consolidated. On October 12, 1971 the matter was set down for argument and counsel were specifically advised "to be prepared to discuss the need for the petitioners to exhaust state remedies and the possibility of abstention."

On January 25, 1972, the Court issued an order affirming, 9 to 3, the judgments of the District Court in all three cases "upon consideration of the merits and upon the authority of *Wilwording* v. *Swenson*," 404 U.S. 249 (1971) (115a). Eight judges wrote separate opinions.

Chief Judge Friendly had previously voted for reversal but felt bound to affirm the orders of the lower court after this court's decision in *Wilwording*.

He expressed concern for the effect on federal-state relations caused by petitions of state prisoners complaining of the "time or conditions of their confinement" and pointed out that the concern for these relations "is not limited to attacks on the validity of the convictions". However, he concluded that if these petitions are held to be in the nature of civil rights actions, a federal court cannot require exhaustion of state remedies because of the decisions of this Court, including *Wilwording*, and because, in view of the *res judicata* effect, "abstention would mean abdication in any case where the state afforded a fair hearing" (116a).

Judge Friendly suggested instead that the

> "right answer . . . is that, under the broad scope the Supreme Court has given to the 'Great Writ' as enacted by the Act of 1867, 14 Stat. 385, all state prisoner petitions complaining of the length or manner of custody, however phrased, are in fact petitions for habeas corpus . . ."

to which the exhaustion requirement of § 2254(b) is applicable (116-117a). As such they would not be subject to *res judicata*.

Judge Friendly acknowledged that several cases, including *Houghton* v. *Shafer*, 392 U.S. 639 (1968) and *Jackson* v. *Bishop*, 404 F. 2d 571 (8th Cir. 1968), cited in *Wilwording*,

> "have assumed that state prisoner complaints over the conditions of custody come under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) rather than under 28 U.S.C. § 2254. But the issue was not there raised and the problem of such prisoner applications had not yet reached its present dimensions." (117a)

This analysis, if correct would seem to preclude an inmate from avoiding the exhaustion requirement simply by

denominating the petition as one under the Civil Rights Act. "But *Wilwording* seems to indicate that he can" and, therefore, Judge Friendly felt constrained to affirm (117a).

Judge Waterman concurred in the affirmance and referred to his dissenting opinion in *Rodriguez* v. *McGinnis*, 451 F. 2d 730 (2d Cir. 1971).

Judge Smith, concurring, concluded that neither the doctrine of abstention nor the habeas corpus exhaustion requirement could bar a state prisoner from choosing a federal forum under the Civil Rights Act. In addition, he questioned whether the federal courts should attempt to avoid or delay hearing state prisoners' complaints of unconstitutional abuse since although many petitions "are poorly prepared, confusing and mendacious" and "do take the time of busy courts", the instant cases demonstrate that there are cases of substance which make the "effort worthwhile" (118a).

Judge Kaufman viewed the question for decision solely in terms of whether exhaustion of judicial remedies was required before a state prisoner could seek relief under the Civil Rights Act and concluded that it was not, especially after *Wilwording* (119a). He did not deal with the question of whether the claims before the Court were properly brought under the Civil Rights Act to begin with but assumed that they were. Indeed, except for Judges Friendly and Mansfield, none of the judges who wrote opinions undertook to discuss, let alone resolve this question.

In Judge Kaufman's view

> "federal jurisdiction in cases involving prisoner rights is [no] more offensive to the state than federal jurisdiction in the areas of police procedures for search, arrest and detention . . . or education . . . or welfare . . . or public housing . . ." (120a)

In any event, neither this reason nor the increasing burden on the federal courts is a "tolerable basis for declining

jurisdiction where a prisoner specifically alleges facts indicating a callous disregard of his basic human and unconstitutional rights, see *Haines* v. *Kerner*, 406 U.S.L.W. 4156 (U.S., Jan. 13, 1972)" (120a).

Judge Kaufman reasoned that allowing inmates the option of proceeding under the Civil Rights Act would not subvert the exhaustion requirement of the habeas corpus statute since 28 U.S.C. § 2254(b) is intended to apply only where the original conviction and sentence are being challenged (121a). In so doing he ignored the fact that in *Wilwording* this Court assumed the applicability of the exhaustion requirement to such claims if brought by way of habeas corpus. On the other hand, Judge Kaufman relied upon the fact that in *Wilwording* this Court *sua sponte* construed the petition as in the nature of a civil rights action and he concluded from this that inmates have an option to use either procedure.

> "I find it difficult to believe that the Court, confronted with the alternative modes of pleading, overlooked or did not consider fully the interaction of 28 U.S.C. § 2254(b) and 42 U.S.C. § 1983." (121a)

Judge Feinberg also rejected the applicability of the exhaustion and abstention doctrines suggesting that in view of the overwhelming numbers of "frivolous prisoner petitions" some fair way of dealing with the problem is called for but it must come by way of a statute from Congress

> "which could take into account the conflicting policy considerations and could include compromises, limitations and safeguards that one as a court cannot legislate." (122a)

Judge Mansfield stated that prior to *Wilwording* he believed that

> "a federal court, upon its finding that the prisoner was seeking equitable relief [in a § 1983 complaint which could not be treated as a petition for habeas

> corpus] and was afforded an adequate state court remedy (as here), had the discretionary power as a court of equity to defer action pending the prisoner's application to the state court for relief. . . . Upon the prisoner's showing that the state would not afford a reasonably prompt and fair hearing, on the other hand, the federal court would be required to proceed." (122-123a)

In support of this view Judge Mansfield emphasized both the competence and convenience of the state courts in regard to this particular type of claim. He also cited statistics which attest to the

> "extent to which state prisoners' *habeas corpus* petitions have been dressed up in a § 1983 suit of clothes, often merely with a view to the prisoner's availing himself of the change of scenery offered by federal facilities. . . ." (123a)

Judge Oakes disputed the suggestion that the federal courts are being flooded by frivolous claims of state prisoners but if such a burden has been created the solution must come from the Legislature. He further expressed his "vehement disagreement" with the opinions of Judge Friendly and Mansfield to the extent that they "imply a request to the Supreme Court to reconsider and overrule its own line of cases sustaining jurisdiction . . ." (124a).

Judge Lumbard dissented together with Judges Hayes and Moore stating that he favored reversing and remanding to the District Court "with directions to stay further proceedings pending a hearing of the claims in the state court" (125a).

Judge Lumbard acknowledged that *Wilwording* suggests that state prisoners need not exhaust their state judicial remedies prior to invoking § 1983 but pointed out that in that case it was clear that Missouri Courts did not review such claims. By contrast, New York "does provide an

adequate remedy in its courts for the redress of legitimate prisoner complaints" (126a) [citing Section 79-c of the New York Civil Rights Law] and, therefore, except in cases of on-going physical brutality, he would require prior resort to this remedy.

Although this Court's decisions in *Monroe* v. *Pape*, 365 U.S. 167 (1961), *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), *Damico* v. *California*, 389 U.S. 416 (1967) and *Houghton* v. *Schafer*, 392 U.S. 639 (1968) have been relied upon to reach the contrary conclusion, Judge Lumbard emphasized the fact that only *Houghton* involved a state prisoner's claim and there was no evidence there regarding the nature of state remedies available.

> "In any event, the Court did not pass on the considerations which seem to me to compel the conclusion that the federal courts should not hear these cases in the first instance where the state courts are ready, willing and able to give relief." (126a)

These considerations include the state's interest in resolving disputes between "inmates and jailers", the greater convenience of hearing these claims in nearby state courts and the potential for increasing tension in the institution as a result of permitting review in the federal courts (127a). Judge Lumbard cited by way of example the dislocation caused by the lengthy hearing in *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (*in banc*). If the state court hearing is not full and fair, the inmate would still have available a *de novo* review in the federal court.

Judge Lumbard included statistics showing that the number of civil rights actions filed in the Second Circuit by state prisoners has increased from 21 in 1966 to 585 in 1971 and disputed that § 1983 was intended to "be the means whereby state prisoners would place state authorities on trial for the manner in which they were cared for and disciplined in state prisons" (128a). Although more

habeas corpus petitions are filed Judge Lumbard pointed out that many of these can be disposed of on the papers whereas many § 1983 actions require hearings and the testimony of witnesses. Furthermore, in habeas corpus

> "a record has already been made in the state court, whereas civil rights cases always raise issues which have recently arisen and are wholly undetermined." (129a)

Judge Lumbard warned that unless the district courts defer these matters to the state courts as a matter of discretion, "the federal courts will find themselves in the business of running and regulating state prisons" (129a).

Summary of Argument

Respondents were duly convicted by state courts and were confined at the commencement of these actions by state authorities. Despite the ready availability of state remedies they proceeded directly to federal court claiming under the Civil Rights Act (42 U.S.C. § 1983) that they were entitled to their release from custody because the Commissioner of Correctional Services and his subordinates unconstitutionally extended their time in prison by depriving them of good conduct time credits.

However, a civil rights action was not the proper procedure for reviewing these or any other claims of state prisoners relating to their confinement. That is the specific function of the writ of habeas corpus (28 U.S.C. § 2243)—a remedy which respondents could not utilize because they had not first presented their contentions to the state courts. 28 U.S.C. § 2254; *Picard* v. *Connor*, 404 U.S. 270 (1971).

These cases thus demonstrate that although it is necessary and proper that the state courts have an opportunity to review state prisoner claims of misconduct by correction authorities, state inmates presently have the power of thwarting that interest and affecting the interest of the

federal courts as well. Moreover, since this Court's decision in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971), the interests of the state courts may also be affected by the apparent power of the federal courts to treat as civil rights actions applications initiated by way of a habeas corpus petition.

Petitioners believe that state prisoners should not have the option of determining whether a federal or state court initially hears their complaints, but must proceed by way of habeas corpus. *A fortiori*, the classification of prisoner complaints should not vary according to which federal court hears a particular case.

The rationale for the concurrent federal remedies in prison condition cases has never been articulated. However, the parallel development undoubtedly reflects the fact that prior to this Court's decisions in *Jones* v. *Cunningham*, 371 U.S. 263 (1963) and *Carafas* v. *LaVallee*, 391 U.S. 234 (1968) the limits of the concept of custody for purposes of habeas corpus were uncertain. Elimination of this uncertainty now precludes the granting of equitable relief under the Civil Rights Act because an adequate legal remedy by way of federal habeas corpus is available.

So long as both state and federal courts were reluctant to review the actions of state correction authorities it mattered little in practical terms which of the two remedies was utilized by the state prisoner. In recent years, however, this reluctance, often described as the "hands-off doctrine", has been criticized and observed more often in the breach.* Understandably, there has been a flood of actions by state prisoners relating to all aspects of their

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* See generally Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. Pa. L. Rev. 985 (1962); Goldfarb and [illegible], *Redressing Prisoners' Grievances*, 39 Geo. Wash. L. Rev. 175 (1970).

confinement. Typically they are brought under the Civil Rights Act in order to avoid the exhaustion requirement. However, as in *Wilwording*, the inmate who has previously brought a civil rights action may seek to avoid the strictures of *res judicata* by petitioning for habeas corpus. The result is not merely an increased burden on the federal courts but also an increased strain on the relationship between federal and state courts.

In the face of both the unmistakable trend toward state prisoner reliance on the Civil Rights Act and the disparity in treatment which must result from the reliance below on the *Wilwording* decision, all prisoner claims relating to their confinement should be required to be brought by way of habeas corpus which is a flexible remedy, particularly suited to the review of prisoner claims of any type. This conclusion not only takes into account the nature of the remedy and the interests of the inmate, but also is responsive to the interests of the federal courts which have been deluged with this type of application, the state courts which have a distinct role to play in developing and applying federal standards, and the state correction authorities who have taken significant steps to protect the inmate's developing rights.

POINT I

The habeas corpus statute is specifically applicable to state prisoners and tailored to their litigation needs. That statute—and not the inmate or local federal court—should determine how their claims relating to confinement are reviewed, particularly since the habeas corpus remedy respects the valid concerns of the state in reviewing all prisoner claims.

The essence of an application for a writ of habeas corpus is an attack by a person in custody on the legality of that custody. 28 U.S.C. § 2254(a). As a result of this Court's expansion of the concept of custody, and con-

...antly of the relief available by way of habeas corpus, ... remedy properly comprehends *all* inmate attacks on ... custody, whether the challenge is to the manner of ...ody, the place of confinement or the actual length of ...tody. Therefore, such claims should not be considered ...der the Civil Rights Act but only by way of habeas ...rpus.

It is now clear that the two longstanding conceptual re...trictions on the applicability of the habeas corpus remedy ...prisoner claims no longer exist. The first is that habeas ...rpus lies only to effect immediate release of the inmate. ...e other is that habeas corpus is limited to reviewing the ...lidity of the conviction and sentence.

...arafas v. *LaVallee*, 391 U.S. 234, 239 (1968) established ...at

> "the [habeas corpus] statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that '[t]he court shall . . . dispose of the matter as law and justice require.' 28 U.S.C. § 2243 . . ."

...e also *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206, ...10 (1951).

...s this Court observed in *Jones* v. *Cunningham*, 371 ...S. 236, 243 (1963):

> "[The writ of habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."

...hus, recent cases have applied the habeas corpus ...edy to questions of solitary confinement (*Jones* v.

Decker, 436 F. 2d 955 [5th Cir. 1970]), future release (*Peyton* v. *Rowe*, 391 U.S. 54 [1968]; *United States ex rel. Meadows* v. *New York*, 426 F. 2d 1176 [2d Cir. 1970]; *Nelson* v. *George*, 399 U.S. 224 [1970]) and conditions of confinement imposed by prison authorities. *Johnson* v. *Avery*, 393 U.S. 483 (1969). See *"Developments in the Law—Federal Habeas Corpus"*, 83 Harv. L. Rev. 1038, 1079-1087 (1970).

The remedy has also been applied in cases involving changes in the place and nature of the confinement. *United States ex rel. Schuster* v. *Herold*, 410 F. 2d 1071 (2d Cir. 1969), cert. denied 396 U.S. 847; *Strowder* v. *Shovlin*, 380 F. 2d 370 (3d Cir. 1967). But see *Gomez* v. *Miller*, 341 F. Supp. 323 (S.D.N.Y. 1972) (three judge court declared unconstitutional state procedure for committing defendants not yet tried to Matteawan State Hospital) (jurisdictional statement filed sub nom. *Miller* v. *Gomez*, August 21, 1972, 41 U.S.L.W. 3102).*

A fortiori, habeas corpus is the appropriate means of questioning the legality of the *duration* of custody in good conduct time cases such as the instant ones, all of which relate in essence to the right to future release. But see *Landman* v. *Royster*, 333 F. Supp. 621, 650-51 (E.D. Va. 1971). Thus, although respondents' applications made allegations regarding *inter alia* the fairness of disciplinary procedures, the constitutional import of failing to maintain certain records as required by state statute and the seriousness of the punishment imposed in relation to the offense charged, the demand in each was for the restoration of good time which had been either withheld or forfeited. Resolution of these claims, therefore, is necessarily directly related to custody since it affects the most concrete example of custody, the duration of physical

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* In *Gomez*, according to the majority, the case could not be classified as habeas corpus because granting the relief sought by the plaintiffs would not result in their release from custody.

confinement within the institution. Indeed, one writer has stated:

> "From the inmate's standpoint the most severe punishment is that of good time forfeiture, because it affects the length of the term which he must serve."

Jacob, *Prison Discipline and Inmate Rights*, 5 Harv. Civil Rights L. Rev. 227, 234 (1970).

Similarly, claims affecting parole eligibility and parole revocation are natural cases for consideration by way of habeas corpus. *Morrisey* v. *Brewer*, —— U.S. ——, 92 S.Ct. 2593 (1972); *Daugherty* v. *Craven*, 422 F. 2d 7 (9th Cir.) cert. denied 397 U.S. 964 (1970); *Morris* v. *Wingo*, 431 F. 2d 651 (6th Cir. 1970); *Murphy* v. *Turner*, 526 F. 2d 462 (10th Cir. 1970); *Smartt* v. *Avery*, 411 F. 2d 408 (6th Cir. 1969).

The habeas corpus nature of all of these cases is not altered by the underlying constitutional issues raised any more than an ordinary habeas corpus application challenging the inmate's conviction is altered by variations in the underlying constitutional claim involved. In both situations the essence of the proceeding is the legality of custody.

This fact was recognized nearly thirty years ago by the Sixth Circuit in its far-sighted opinion in *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944):

> "Any unlawful restraint of personal liberty may be inquired into on habeas corpus. In re Bonner, 151 U.S. 242, 14 S. Ct. 323, 38 L. Ed. 149. This rule applies although a person is in lawful custody. His conviction and incarceration deprive him only of such liberties as the law has ordained he shall suffer for his transgressions. * * *
>
> A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his

> confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits. Logan v. United States, 144 U.S. 263, 12 S. Ct. 617, 37 L. Ed. 429."

Nevertheless, the Court below concluded that the instant cases may be considered under the Civil Rights Act even though a favorable decision on the merits resulted in respondents' release from physical confinement—the traditional and typical relief sought by way of habeas corpus.*

It is evident from the individual opinions of the Court of Appeals that this result was reached without, for the most part, any attempt to consider the proper nature of the cause of action under review. Only Judges Friendly and Mansfield determined that these cases should be treated as habeas corpus and not civil rights actions but, despite this belief, felt constrained to join the majority following their reading of this Court's decision in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971).

The potential impact of *Wilwording*, as illustrated by its application in this case, justifies, if not compels, a reexamination of the conclusion reached there. In *Wilwording* the petitioners filed habeas corpus applications in the District Court raising Eighth Amendment claims relating to "living conditions and disciplinary measures . . . in maximum security confinement," 404 U.S. at 249. Counsel who represented the petitioners understandably never contended that the actions were other than habeas corpus, since the same or similar claims previously had been resolved against these same petitioners in civil rights actions.**

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* A subsequent disavowal by the successful applicant that this was his purpose in bringing the action is both unrealistic and legally irrelevant. *Grayson* v. *Montgomery*, 421 F. 2d 1306, 1308 (1st Cir. 1970). Section 2254(a) says nothing about motive.

** The doctrine of *res judicata* is inapplicable in habeas corpus. *Fay* v. *Noia*, 372 U.S. 391, 423 (1963).

The sole issue decided by the Eighth Circuit and presented to this Court was the question of exhaustion of state remedies for purposes of 28 U.S.C. § 2254(b).

After finding that the claims raised were "cognizable in federal habeas corpus" (404 U.S. at 249, 251) this Court held that the exhaustion requirement did not require repetition of state applications since Missouri had no available remedy for the review of these claims. Then, without being tendered the alternative by the petitioners or their attorneys, this Court, *sua sponte* held that in any event, the petitioners were *"entitled* to have their action treated as claims for relief under the Civil Rights Act, not subject, on the basis of their allegations, to exhaustion requirements." 404 U.S. at 251 (emphasis supplied).

The brief opinion in *Wilwording* does not indicate why this Court denominated the actions as civil rights actions despite the studious attempt by counsel to avoid this designation. Was it the particular claims raised in that case? Was it the type of claim raised? Or does *Wilwording* permit judicial redesignation of the pleadings in *any* prisoner initiated action except those relating to conviction and sentence?*

Whichever consideration motivated the majority of this Court in *Wilwording*, the Court below clearly read the opinion as reinforcing, at the least, the *inmate's* option of deciding under which statute to bring his claims. Even given this construction, *Wilwording* threatens to become a springboard for unpredictability in the area of prisoner

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* The redesignation which took place in *Wilwording* is to be distinguished from the case where a court merely construes a poorly drafted *pro se* application broadly so as to protect the rights of the inmate. *Johnson* v. *Avery*, 252 F. Supp. 783 (M.D. Tenn. 1966). In *Wilwording*, the petitioners—who were represented by counsel—not only proceeded by means of an appropriate remedy but, according to the holding of this Court, their claims were susceptible to immediate review because the exhaustion requirement had been satisfied.

claims at the very time when, because of the decline of the hands-off doctrine, the number of such claims is mushrooming and firm guidelines have become a necessity.

For example, in some circuits, parole questions, which inevitably affect custody, may correctly be regarded as habeas corpus and subject to the exhaustion requirement. *Smartt* v. *Avery*, 411 F. 2d 408 (6th Cir. 1969). In other circuits, however, the federal courts simply may proceed to consider the merits of such claims on the ground that they are cognizable under the Civil Rights Act. *United States ex rel. Campbell* v. *Pate*, 401 F. 2d 55 (7th Cir. 1969). Yet there is absolutely no substantive reason for the difference in treatment. Compare also *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 197) (in banc), cert. denied sub nom. *Oswald* v. *Sostre*, 404 U.S. 1049 (1972) (release from segregation reviewed under the Civil Rights Act) with *Jones* v. *Decker*, 436 F. 2d 955 (5th Cir. 1970) (release from segregation is cognizable via habeas corpus and exhaustion is required) and *Johnson* v. *Avery*, 252 F. Supp. 783, 787 (M.D. Tenn. 1966), *rev'd* 383 F. 2d 353 (6th Cir. 1967), *rev'd* 393 U.S. 483 (1969) (solitary confinement "is, in a sense, a jail within a jail").

Conflict within a circuit is similarly a possibility if the nature of the cause of action may reflect the vagaries of court and plantiff. *Gomez* v. *Miller*, 341 F. Supp. 323 (S.D.N.Y. 1972) is an example insofar as the three-judge court, citing *Wilwording*, specifically rejected defendant's contention that the action was in the nature of habeas corpus despite an earlier decision by the Second Circuit in an analogous situation. *United States ex rel. Schuster* v. *Herold*, 410 F. 2d 1071 (2d Cir. 1969), cert. denied 396 U.S. 847 (habeas corpus).

Aside from differences in treatment, if federal courts may freely redesignate the nature of the action and state prisoners have the option of presenting their grievances under the Civil Rights Act, this Court's expansion of the

will necessarily be affected. The practical consequence must be that habeas corpus relief will be confined largely to cases involving the validity of the original conviction and sentence.

A. If state prisoners may ignore the habeas corpus remedy and bring their claims regarding confinement directly to the federal courts under the Civil Rights Act, they have the power of unilaterally overriding the State's interest in first reviewing such claims.

Utilization of the habeas corpus remedy serves the principle of comity by means of the exhaustion requirement. That principle—defined by the late Mr. Justice Black as "a proper respect for state functions" (*Younger* v. *Harris*, 401 U.S. 37, 44 [1971])—has as much relevance in the area of state prison administration as in cases where the original conviction and sentence are being challenged. Indeed, Chief Judge Friendly suggests that it may have more relevance.

Thus, traditionally the federal courts have expressed reluctance to intervene in this area except in the most egregious cases. *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967); *Pierce* v. *LaVallee*, 293 F. 2d 233 (2d Cir. 1961); *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Douglas* v. *Sigler*, 386 F. 2d 684, 688 (8th Cir. 1967); *United States* v. *Marlowe*, 341 F. 2d 782, 789 (9th Cir. 1965). However, in recent years this reluctance has diminished and federal courts have reviewed virtually every aspect of prison administration ranging from broad-based examination of institution-wide conditions (See, *e.g.*, *Landman* v. *Royster*, 333 F. Supp. 621 [E.D. Va. 1971]; *Holt* v. *Sarver*, 309 F. Supp. 362 [E.D. Ark. 1970]) to such individual claims as denial of medical treatment (*Martinez* v. *Mancusi*, 443 F. 2d 921 [2d Cir. 1970]) and cases like the instant ones challenging the validity of disciplinary decisions. See also *Carothers* v. *Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970). It therefore becomes even more important to require that

state prisoner complaints be presented by way of habeas corpus—a remedy which can mitigate the irritation to federal-state relations that is the natural consequence of this increased intervention, especially as greater numbers of state inmates seek direct review in the federal courts.

In this area, no less than in the area of conviction and sentence, the exhaustion requirement of the habeas remedy "preserves the role of the state courts in the application and enforcement of federal law." In this area, no less than in the area of conviction and sentence, permitting inmates to by-pass the state courts

> "would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests." *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1094 (1970).

Respondent Katzoff argued in the Circuit Court, however, that even if prisoner complaints must be brought by way of habeas corpus, the exhaustion requirement would not be applicable because historically it was intended to apply only to attacks on the validity of the conviction and sentence. In support of his position he cited *Ex Parte Royall*, 117 U.S. 241 (1886), the decision in which the exhaustion doctrine has its origin, and a Wisconsin District Court decision, *Edwards* v. *Schmidt*, 321 F. Supp. 68 (D.C. Wis. 1971). Apparently there was no unanimity among the Second Circuit on this point despite this Court's unequivocal application of the exhaustion doctrine to the Eighth Amendment claims in *Wilwording* v. *Swenson*. For example, Judge Friendly assumed the requirement would be applicable. Judge Kaufman, on the other hand, viewed the requirement restrictively.

Respondent's argument is invalid for at least two reasons. First, contrary to respondent's reading of *Ex Parte*

Lovell, the language of the decision is clearly broad enough to encompass a more generalized concern with federal-state relations than simply non-interference with state court criminal judgments. Thus, the opinion states that the discretion vested in the District Courts

> "should be exercised in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." 117 U.S. at 251.

The same broad concern for "Our Federalism" was echoed by Mr. Black in a somewhat different but related context:

> "The concept [of federalism] does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."

Younger v. *Harris*, 401 U.S. 37, 44 (1971).

More important, the habeas corpus remedy as we know it today is radically different from what it was even twenty years ago and, therefore, the impact on federal-state relations is also different. It is only appropriate that the applicability of the exhaustion requirement be responsive

to the dynamics of the remedy as well as to the expansion of the substantive rights now recognized. *Edwards* v. *Schmidt*, *supra*, is, therefore, of dubious value as authority just because of its failure to examine the reasons for applying the exhaustion requirement outside the sphere of claims relating to conviction and sentence.*

The concern for the role of the state courts in reviewing prisoner complaints has particular relevance because the claims asserted arise as a direct consequence of the process of state conviction and sentence. This relationship is perhaps most evident with respect to problems of parole and good conduct time to the extent that these problems inhere in the sentence imposed. However, the manner in which the sentence is administered is equally a consequence of conviction and sentence and the courts which impose these restraints have the primary obligation and should bear the primary burden of insuring that the restraints are not unconstitutional or otherwise in excess of the punishment contemplated by the sentence.

Some states have long assumed this burden and provide a broad remedy for all types of prisoner complaints. California is an outstanding example. See, *e.g.*, *In re Harrell*, 470 P. 2d 640 (1970) (attack on regulation restricting mutual prisoner legal assistance); *In re Riddle*, 372 P. 2d 304 (1962) (alleged infliction of cruel and unusual punishment); *In re Ferguson*, 361 P. 2d 417 (1961) (retriction on religious rights of inmates).

Other states have only recently responded to the dramatic expansion of prisoner rights now taking place. In

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* *Edwards* also reads the legislative history of 28 U.S.C. § 225 enacted in 1948 (Act of June 25, 1948, Ch. 646, 62 Stat. 967) a limiting the exhaustion requirement solely to post-conviction a tacks on conviction and sentence. Yet this Court has held th § 2254 is an expression of prior case law (*Fay* v. *Noia*, 372 U.S. 3 435 [1963]), which would include *Ex Parte Royall* where the d trine was applied in *advance* of a state court trial.

ex rel. Thomas v. *State*, 198 N.W. 2d 675 (Sup. Ct. 1972), the Supreme Court of Wisconsin held that mandamus lies to test whether state correction authorities properly exercised their discretion with respect to medical treatment afforded petitioner. The Court also comprehensively reviewed the recent decisions involving censureship of mail and held that the petitioner was entitled to an injunction restraining prison officials from interfering with his mail to a government agency "unless the Department can show justification for its action." 198 N.W. 2d at 683.

In *Jackson* v. *Hendrick*, —— D. and C. 2d —— (Ct. of Com. Pleas, Phila. Co., April 7, 1972), 40 U.S.L.W. 2710 (May 2, 1972), the Court of Common Pleas in Pennsylvania held that conditions in the three city prisons of Philadelphia violated both the federal and state constitutions.

In *Sellers* v. *State of South Carolina*, Court of General Sessions, South Carolina (February 1, 1972), a petition was brought by five inmates challenging the revocation of their good conduct time credits and their confinement in segregation. Following a hearing, the South Carolina Court of General Sessions ordered restoration of the credits on the ground that they were forfeited without "minimal procedural protection for the petitioner." Confinement of the petitioners in administrative segregation was found to be proper.* Significantly, although both sides have appealed, two of the petitioners nevertheless made interim applications to the Federal District Court for relief. In *Lambert* v. *Department of Corrections*, —— F. Supp. ——, Civil No. 71-1185 (D.C.S.C., April 12, 1972), the petition was dismissed for failure to exhaust state remedies. In *Sellers* v. *Department of Corrections*, ——

*Since decisions of the Court of General Sessions are not officially reported, a copy of the order in the *Sellers* case is set forth as an Exhibit to this brief and designated as Exhibit "A".

F. Supp. ——, Civil No. 71-1161 (D.C.S.C., March 28, 1972), the District Court viewed some of the claims as cognizable under the Civil Rights Act and retained jurisdiction but deferred ruling on the merits pending exhaustion of state court remedies. The case is illustrative not only of the state court's willingness to comprehensively review the claims raised in light of changing standards but also of the unrestrained resort by inmates to the federal courts and the disparity of treatment depending on which federal judge reviews the applications.

New York provides a perfect example of what can happen if state prisoners are free to by-pass the state courts. In 1969 the New York Legislature, in direct response to the Second Circuit's decision in *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967), enacted Section 79-c of the New York Civil Rights Act which provides an explicit remedy by way of injunction to inmates "for improper treatment where such treatment constitutes a violation of [their] constitutional rights." In *Marcelin* v. *Scott*, 33 A.D. 2d 588 (3d Dept. 1969), Section 79-c was given the following broad interpretation:

> "Said amendment, remedial in nature, designed to correct an imperfection in the prior law or to provide a remedy for a wrong if none previously existed, is to be liberally construed so as to spread its beneficial results as widely as possible . . ."

Nevertheless there is not one reported decision in New York on the merits of any claim brought under this unique provision. Nor has investigation of files in this office disclosed any unreported decisions. The fact is that Section 79-c simply is not used by New York inmates who instead have applied to the federal courts for injunctive relief. It is all too apparent that so long as state inmates have it within their power to ignore such remedies there is little incentive for the Legislature to make further changes or for the state courts to liberally construe them.

A related consideration in evaluating the federal-state relationship is the fact that many states, including New York, have promulgated new and far reaching regulations relating to discipline procedures as well as other areas of prison administration. See *e.g.*, *Cupp* v. *Swenson*, 288 F. Supp. 1 (W.D. Mo. 1968); *Morris* v. *Travisono*, 310 F. Supp. 857 (D.R.I. 1970). They should have the initial opportunity to see that the new procedures are being properly and consistently implemented.

As the District Court observed in *Cupp* v. *Swenson*, *supra*, in light of new grievance procedures available to Missouri inmates:

> "The interests of comity also require that this Court allow . . . the higher officials of the Department of Corrections to be aware of and make decisions about administrative practices and procedures before litigation in this Court involving federally protected rights of inmates is processed to final judgment.
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> • • •
>
> [W]hen appropriate provisions for administrative review have been established by penitentiary administration for claims of deprivation of rights, abstention by a court until final administrative determination has been made is justified." 28 F. Supp. at 3.

Cf. *Sostre* v. *McGinnis*, 442 F. 2d 178 (2d Cir. 1971) (in banc), cert. denied sub nom. *Oswald* v. *Sostre*, 404 U.S. 1049 (1972) (letter to Commissioner of Correction deemed inadequate administrative review).

The Court in *Cupp* also noted that requiring administrative review would often result in more rapid relief than would protracted litigation and, in any event, both the inmates and the administration would have "the benefit of a written and documented decision in the event future court action should prove to be necessary."

Significantly, neither respondents nor the Court below have ever taken into account the fact that the relief typi-

cally sought by federal prisoners who challenge a forfeiture of good conduct time (18 U.S.C. §4161) is habeas corpus (*McKinney* v. *Taylor*, 344 F. 2d 854 [10th Cir. 1965]; *Powell* v. *Hunter*, 172 F. 2d 331 [10th Cir. 1949]; *Sullivan* v. *Ciccone*, 311 F. Supp. 456 [W.D. Mo. 1970]; *Lloyd* v. *Heritage*, 199 F. Supp. 46 [N.D. Ga. 1961]) and that a prerequisite to habeas corpus review in these cases is the exhaustion of available administrative remedies. *Smoake* v. *Willingham*, 359 F. 2d 386 (10th Cir. 1966); *United States ex rel. Weyrauch* v. *Parker*, 268 F. Supp. 785 (M.D. Pa. 1967). See also *Light* v. *United States*, 430 F. 2d 932 (5th Cir. 1970) (federal prisoner claiming interference with right to consult with counsel required to exhaust administrative remedies); *Paden* v. *United States*, 430 F. 2d 882 (5th Cir. 1970) (federal prisoner seeking order directing prison authorities to permit formation of black culture organization and allow use of prison facilities for activities required to exhaust administrative remedies).

The appropriateness of requiring prior resort to the state courts is underscored by the very nature of prison administration. Because potential litigation arises on a day-to-day basis it is most efficiently handled where the alleged violation occurred.

Judge Mansfield correctly drew attention to the fact that the State Courts are not only indisputably competent to apply federal constitutional principles but also are physically and practically in a better position to do so. With the exception of the Wallkill Correctional Facility, State Supreme Court judges sit on a regular basis at each of the State's correctional facilities to "hear applications for writs of habeas corpus *or other proceedings* regarding detention or confinement." *Wright* v. *McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970). In *Wright* this practice was characterized as "the acme of judicial service."*

* This language was not affected by the decision of the Second Circuit which affirmed in part, and reversed in part the orders of the District Court. 460 F. 2d 126 (2d Cir. 1972).

Thus, inmates may present their grievances to a court at the place of their confinement where the relevant records are available and where potential witnesses usually are located. Under this system inmates are in a position to press their claims without the delay occasioned by the geographical obstacles which arise when they seek relief in the federal courts. Moreover, requiring prisoners to bring their complaints closer to home minimizes the temptation of initiating litigation solely for the purpose of travel.

Judge Kaufman suggests that the State is no more sensitive to federal jurisdiction in 'cases involving prisoners' complaints than it is to federal jurisdiction in the areas of education, welfare, public housing and police procedures for search and arrest.* We respectfully disagree. The area of prison administration is unique.

The relationship of state prisoners and the officers of the State who supervise their confinement is far more intimate than that of the State and a private citizen. For state prisoners eating, sleeping, dressing, washing, working and playing all are done under the color of state "statute, ordinance, regulation, custom or usage" (42 U.S.C. § 1983). This is because

> "[e]normous discretion is left to correctional administrators to define the conditions of imprisonment. They determine the way in which the offender will live for the term of imprisonment; how he is fed and clothed; whether he sleeps in a cell or a dormitory; whether he spends his days locked up or in relative freedom; what opportunity he has for work, education or recreation. They regulate his access to the outside world by defining mailing and visiting privileges. They

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*This suggestion represents an apparent departure from Judge Kaufman's views as stated in 1967 in the case of *Wright* v. *McMann*, 387 F. 2d 519 (2d Cir. 1967) where he characterized the area of prison administration as "an area so peculiarly within the concern of the states." 387 F. 2d at 525.

define rules of conduct and the penalties for violation of such rules. And, increasingly, they make classification decisions—assigning different prisoners to different kinds of correctional programs."

President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections, 84.

Thus, the possibility for federal litigation is limitless. What for a private citizen would be an altercation with his landlord, a difference with his employer, a dispute with a clothier, an argument with a neighbor, a family feud becomes, for the prisoner, a federal case. *Landman* v. *Royster*, 333 F. Supp. 621, 644 (E.D. Va. 1971).

The petitioner in *King* v. *McGinnis*, 289 F. Supp. 466 (S.D.N.Y. 1968) challenged the unsealing of his Christmas cards under the First Amendment. In New Jersey, a petitioner sought a room with a view in a federal action. *United States ex rel. Stuart* v. *Yeager*, 293 F. Supp. 1079 (D.C.N.J. 1968). Even Courts of Appeals have become embroiled with the petty disputes of prisoners. In *Brooks* v. *Wainwright*, 428 F. 2d 652 (5th Cir. 1970), the Court reviewed petitioner's tonsorial complaints. In *Howard* v. *Swenson*, 426 F. 2d 277 (8th Cir. 1970), another Court solemnly considered the confiscation of shoes. And in *Hanvey* v. *Pinto*, 441 F. 2d 1154 (3d Cir. 1971), the mere transfer of an inmate to a different wing of the same prison was claimed to be unconstitutional simply because the consequent change in prison jobs afforded him less of an opportunity to earn good time credits.

The geometric increase in the number of colorable claims which must be formally processed as civil actions bears witness to the validity of the State's concern in this area. In 1970 the number of non-habeas corpus petitions filed by state prisoners in the federal courts increased by 41 per cent over 1969, and by 430 per cent over 1963. *Wilwording* v. *Swenson*, 439 F. 2d 1331, 1333 n. 3 (8th Cir. 1971). Statis-

tics cited by Judge Lumbard showed that the number of civil rights actions initiated by state prisoners in the Second Circuit increased from 21 in 1966 to 585 in 1971.

These numbers also bear witness to the increasing burden on federal courts already plagued by backlogs on the civil calendar. See dissenting opinion of the late Mr. Justice Black in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 423-9 (1971). Judges Feinberg and Oakes argue that this problem is one for the Legislature. We believe, however, that the solution lies not with the Legislature but in the already existing, applicable habeas corpus statute.

B. The state prisoner who proceeds under the Civil Rights Act in order to escape application of the exhaustion requirement sacrifices the protections available to him under the habeas corpus statute.

Habeas corpus is a flexible, efficient, summary mechanism for redressing extraordinary grievances and is an ideal remedy for reviewing prisoner claims which are almost universally instituted *pro se*. Because it is a summary remedy there is an emphasis on swift determination. *Peyton* v. *Rowe*, 391 U.S. 54, 63 (1968) ("a principle aim of the writ is to provide for swift judicial review of alleged unlawful restraints on liberty"). The habeas corpus timetable is as follows:

> "The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
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> * * *
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> When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.
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> * * *

> The court shall summarily hear and determine the facts, and dispose of the matter of law and justice require." (28 U.S.C. § 2243.)

Since the availability of the writ has been so dramatically expanded in recent years, good cause frequently is shown for a greater time for preparation for a habeas corpus hearing. Nonetheless, when the statute was amended in 1966 (Pub. L. 89-711, November 2, 1966), the time limits of 28 U.S.C. § 2243 remained intact.

In addition the statute imposes an affirmative duty of disclosure on the respondent:

> "(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination." (28 U.S.C. § 2254[e]).

Flexibility inheres in the fact that the District Court is empowered to dismiss applications which are frivolous on their face without even requiring a response by the respondent. The statute thereby satisfies the two overriding requirements in these cases—that non-meritorious claims be culled out as early as possible and that meritorious claims be considered as swiftly and completely as possible.

As this Court emphasized in *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969):

> "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."

Consistently with this view of the writ's flexibility, this Court concluded in *Harris* that, although the discovery provisions of the Federal Rules of Civil Procedure are inapplicable to habeas corpus proceedings, "the courts may fashion appropriate modes of procedure [for securing facts], by analogy to existing rules or otherwise in conformity with judicial usage." 394 U.S. at 299. The inmate's right to secure information outside the record is thus protected by "the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." 394 U.S. at 300. See also *Townsend* v. *Sain*, 372 U.S. 293 (1963).

By contrast, the filing of a complaint under the Civil Rights Act initiates an original plenary civil action governed by the full panoply of the Federal Rules of Civil Procedure. Unlike habeas corpus, which under *Townsend* and *Harris* puts great responsibility for formulating the issues and ascertaining the facts upon the District Court, in an ordinary civil action the parties must formulate the issues and ascertain the facts with as little supervision from the Court as possible. The procedural formalities are far more complex.

For example, the rules of discovery are applicable (Federal Rules of Civil Procedure, Rules 26-37) and, in essence, serve one of the functions automatically served by

the exhaustion requirement of the habeas statute, *i.e.*, formulation and narrowing of issues for determination. Aside from creating a procedural problem for the typical *pro se* plaintiff, the discovery devices also afford an opportunity for abuse simply because incarcerated persons would be delighted by the prospect of requiring persons in authority to answer their questions and do their bidding. Even when a prisoner is represented by counsel in such a case, the relationship between the party and his attorney is such that counsel has less tactical control than in the ordinary civil litigation.

The potential for delay is one of the more significant disadvantages of allowing inmates the option of proceeding under the Civil Rights Act. Delay is occasioned, for example, by the use of "elaborate discovery procedures". *Harris* v. *Nelson*, 394 U.S. at 297. And, in general, delay inheres in the very way in which these cases are handled by this office and the courts. As a practical matter, when a *pro se* civil rights complaint is received the state most frequently serves and files an answer. After that the case will lie dormant, in some instances for years. This may be the result of the plaintiff's ignorance regarding the procedures for putting the case on the trial calendar or for moving for summary judgment. Or the delay may simply reflect the fact that the case has become part of the District Court's backlog of civil non-jury cases.*

Although these delays may be lessened by the computerized assignment of cases recently instituted in the Southern District, it is nevertheless true that the typical *pro se*

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* Chief Judge David N. Edelstein of the United States District Court for the Southern District of New York in a speech before the New York County Lawyers Association, stated that, as of December 31, 1971 there was a backlog in the Southern District of 13,944 civil cases. New York Law Journal, February 3, 1972, page 1, col. 4.

application for habeas corpus is decided more expeditiously and with less of a burden on the applicant than is the typical civil rights action.

In view of the adequacy of the habeas corpus remedy as set forth in the statute and interpreted by this Court, equitable relief under the Civil Rights Act should be precluded in the area of prisoners' complaints relating to confinement just as it is where inmates challenge the validity of conviction and sentence. *Potwora* v. *Dillon*, 386 F. 2d 74 (2d Cir. 1967); *Wright* v. *McMann*, 387 F. 2d 519, 523 (2d Cir. 1967); *James* v. *Headly*, 410 F. 2d 325, 335 (5th Cir. 1969); *Appalachian Volunteers, Inc.* v. *Clark*, 432 F. 2d 530 (6th Cir. 1970), cert. denied 401 U.S. 939 (1971); *Gaito* v. *Ellenbogen*, 425 F. 2d 845, 848 (3d Cir. 1970); *Johnson* v. *Walker*, 317 F. 2d 418, 419-20 (5th Cir. 1963).

Respondents have never offered any substantial reason why claims of this nature are not properly treated as habeas corpus but throughout have simply relied upon their fears that if they are habeas corpus and the exhaustion requirement attaches they may never obtain review in the federal courts. That fear dealt with, *infra*, is a separate issue and is insufficient to defeat an otherwise valid classification.

Similarly, the appropriate classification of these cases should not depend upon whether the state provides an adequate damage remedy for alleged constitutional violations as respondents suggest at page 6 of their Brief in Opposition to the Petition for Certiorari. Not every prisoner action seeks damages, as the instant cases demonstrate. Moreover, the real concern of virtually every prisoner action alleging a constitutional violation—whether brought individually or by a class—is the removal of the violation:

"[M]oney damages are small consolation for a man serving a potentially long sentence and complaining of debasing prison conditions which he endured and

fears he might have to endure again." *Wright* v. *McMann*, 387 F. 2d 519, 523 (2d Cir. 1967).

A damage award—assuming that compensatory or punitive damages can be proved—is therefore relatively unimportant as compared with release from segregation, access to the courts, religious freedom, or fair administrative procedures, especially in view of the applicable limitations on recovery. See *Westberry* v. *Fisher*, 309 F. Supp. 12 (S.D. Me. 1970) (doctrine of sovereign immunity applicable). See also *Negrich* v. *Hohn*, 246 F. Supp. 173, 182 (W.D. Pa. 1965) ("[T]he right to bring a lawsuit against an impecunious policeman can scarcely be considered a complete and effective remedy").

There is thus no warrant in theory or practice for respondents' conclusion that an exhaustion requirement will "deprive prisoners of a federal forum and offer them little or nothing in return." Brief in Opposition to Petition, page 6. On the contrary, if an inmate obtains relief in the state courts by demonstrating a violation of his constitutional rights but there is no available state damage remedy, he may bring a civil rights action in federal court based upon his state court judgment. His primary interests will have been protected, the role of the state courts will have been preserved and the federal court will be relieved of separately determining the validity of the underlying claim.

If the state courts reject his claim on the merits and the inmate then seeks federal habeas corpus relief he must still prove his underlying claim as a predicate to obtaining damages. If he is able to do so he may then sue under the Civil Rights Act.

In either case, given the very limited number of successful claims for damages, any burden created by a separate civil rights action is outweighed by the other interests served by the exhaustion requirement. The state prisoner

is still better off with respect to recovering damages than his federal counterpart who may not sue federal authorities under the Civil Rights Act and is basically limited to recovering under the Federal Tort Claims Act for injuries resulting from ordinary negligence. *Muniz* v. *United States*, 374 U.S. 150 (1963).

The hollowness of respondents' damages argument demonstrates that the Civil Rights Act affords state prisoners no significant advantage in terms of remedy but only provides them with a vehicle for circumventing the exhaustion requirement when it suits their purposes. Until now the inmates' option has rested on assumption and not considered judicial decision. The dramatic increase in prisoner litigation requires that this option be foreclosed and state prisoners barred from choosing between two statutes having different prerequisites and different consequences. As Chief Judge Friendly correctly emphasized in his opinion below, the

> "right answer . . . is that, under the broad scope the Supreme Court has given to the 'Great Writ' as enacted by the Act of 1867, 14 Stat. 385, all state prisoner petitions complaining of the length or manner of custody, however phrased, are in fact petitions for habeas corpus . . ."

to which the exhaustion requirement of § 2254(b) is applicable (116-117a).

POINT II

Respondents have failed to exhaust their available and adequate State Court remedies.

Respondents Rodriguez, Katzoff and Kritsky never presented the state courts with an opportunity to review their claims. Therefore, they plainly failed to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b). *Picard* v. *Connor*, 404 U.S. 270 (1971).

The statute provides that a failure to exhaust will be overlooked only where

> "there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Respondents obviously cannot meet these exceptions. The State Supreme Court, a court of general jurisdiction which always sits in the same counties as the prisons and which ordinarily sits in the prisons themselves, reviews complaints by prisoners by way of habeas corpus and under Article 78 of the New York Civil Practice Law and Rules. In addition, Section 79-c of the Civil Rights Law (L. 1969, C. 658, eff. May 21, 1969), although not utilized because the doors to the federal courts are unconditionally open to inmates under the Civil Rights Act, provides a specific statutory remedy. All of these are special proceedings flexible enough to respond to the exigencies of fact finding in the particular case. See, e.g., *People ex rel. Keitt* v. *McMann*, 18 N Y 2d 257 (1966); *Shaw* v. *McGinnis*, 14 N Y 2d 864 (1964); *Marcelin* v. *Scott*, 33 A D 2d 588 (3rd Dept. 1969). See also *Matter of Brown* v. *McGinnis*, 10 N Y 2d 531 (1962). These state judicial remedies were found to be adequate and available by the three dissenting judges below and by Judge Mansfield as well. No member of the Court made a finding to the contrary. Contrast *Wilwording* v. *Swenson*, 404 U.S. 249 (1971) where it was clear from the record that the Missouri courts do not review claims by state prisoners regarding the conditions of their confinement.

Despite the existence of these remedies respondents claimed below that they should be excused from the mandate of 28 U.S.C. § 2254(b) on the ground that application of the exhaustion requirement will effectively bar federal review of good time cases. This argument is based on the time sequence used by the State in finally determining that

good time will be withheld. Under the new regulations established by the New York Department of Correctional Services each inmate's file

> "shall be considered not more than three nor less than two months before the earliest possible date he would be entitled to consideration for parole or conditional or other release if that date depends upon the amount of good behavior allowance to be granted based upon the assumption that he has earned all good behavior allowances that can be granted." 7 N.Y. Code, Rules and Regulations, § 261.3(b).*

Implicit in respondents' argument is their assumption that the state courts will not afford speedy relief in a proper case. However, 28 U.S.C. § 2254(b) makes exactly the opposite assumption unless and until an applicant can make out a case to the contrary and, significantly, appellees have completely failed to do this. See *Mitchell* v. *Rabenfield*, 285 F. Supp. 728, 731 (D.C. Md. 1968).

Moreover, it is far from clear that the already crowded federal courts are in a position to act any more expeditiously than the state courts in protecting the rights involved. The following are the time schedules in the instant cases:

Rodrigues

Disciplinary Hearing	—October 30, 1968
Determination by Prison Commutation Board	—July, 1969
Action Initiated	—September 25, 1969
Alleged Release Date	—October 10, 1969
District Court Decision	—December 23, 1969

*The regulations in effect when the instant actions were commenced provided for review "[a]t least one month prior to the expiration of the minimum or maximum term, less all possible reductions . . ." 7 N.Y.C.R.R. § 60.1(d) (repealed October 19, 1970). The present regulations governing good conduct time allowances are set forth as Exhibit "B" of this brief.

Kritsky

Disciplinary Hearing	—March, 1962
Determination by Prison Commutation Board	—October, 1968
Action Initiated	—August 6, 1969
Alleged Release Date	—February 16, 1970
District Court Decision	—June 12, 1970

Katsoff

Disciplinary Hearing	—January 9, 1969
Determination by Prison Commutation Board	—February 11, 1970
Action Initiated	—July 29, 1970
Alleged Release Date	—June 14, 1970
District Court Decision	—August 18, 1970

In both *Rodrigues* and *Kritsky* which were initiated before the conditional release dates in issue a decision on the merits by the District Court was not reached until well after those dates had passed. *Kritsky* was decided by the District Court more than 10 months after it was initiated. Only in *Katsoff* was there a speedy determination and the action there was not initiated until *after* the date on which Katsoff claimed he was entitled to release.*

There is no evidence that the state courts would act any less expeditiously than the federal courts with respect to these claims and, as Judge Mansfield emphasized, there is good reason to believe they can act even more quickly because of their location and the general practice whereby State Supreme Court judges actually sit in the institutions to hear prisoner claims.

---

* Katsoff alleged that he did not learn of his legal rights until shortly before he initiated his action. There is no similar allegation in the other cases although Kritsky testified he was uncertain of his rights at the time of his *original* disciplinary hearing. He never explained why he waited ten months after the final determination of the Prisoner Commutation Board to act.

The State's procedure of finally reviewing an inmate's record in the institution shortly before the earliest release date possible is not simply a matter of administrative convenience. Rather, it serves the important correctional purpose of allowing each inmate to demonstrate by his good behavior that any previous infraction will not make him a risk to society. To carve out an exception to the exhaustion requirement and thereby deprive the State of an opportunity to review these cases solely because of the time element involved would be to penalize the State for adopting a sound correctional procedure. Furthermore, if the time element is sufficient to excuse exhaustion of state judicial remedies it presumably would also obviate the need for state inmates to utilize the new administrative review procedures recently implemented by the State (7 N.Y. Code, Rules and Regulations, Part 270) in contrast with their federal counterparts. See *Smoake* v. *Willingham*, 359 F.2d 386 (10th Cir. 1966); *United States ex rel. Weyrauch* v. *Parker*, 268 F. Supp. 785 (M.D. Pa. 1967).

Finally, an exception to the exhaustion requirement such as respondents have argued for would logically extend to state prisoners who wish to challenge the constitutionality of a conviction which carries a short sentence. Heretofore such prisoners have been required to satisfy the exhaustion requirement. *Mitchell* v. *Schoonfield*, 285 F. Supp. 728 (D.C. Md. 1968); *Iles* v. *Ellis*, 264 F. Supp. 185 (S.D. Ind. 1967); *United States ex rel. Zevin* v. *Cahn*, 282 F. Supp. 275 (E.D.N.Y. 1968); *Minnesota* v. *Brundage*, 180 U.S. 499, 503 (1901). But see *Ex Parte Kieffer*, 40 F. 399 (C.C.D. Kan. 1889).

In any event, where, as in these cases, the allegedly improper disciplinary proceeding not only results in a good time assessment but also causes the inmate to be placed in segregation, the time problem does not exist. Upon exhausting his administrative remedies the inmate has a ripe cause of action based upon his confinement in segregation just as he would if he were challenging the conditions of segregation *per se*.

Respondents' argument that application of the exhaustion requirement will deprive them of a federal forum not only assumes that state courts will be dilatory but also presupposes that state judges will not be responsive to their claims. In fact, respondent Katzoff made the surprising argument that "state courts are not very sympathetic to prisoners' cases as indeed they are not to so many constitutional claims." Brief for Respondent Katzoff On Rehearing *En Banc*, page 38. However, after making the generalization respondent failed to support it.

Aside from several unfavorable cases dating from the early 1960's, respondent Katzoff merely cited a handful of recent unreported memorandum-decisions dismissing applications which apparently were never appealed. At the same time respondent acknowledged that in *Brabson* v. *Wilkins*, 19 N.Y. 2d 449 (1971) and *People ex rel. Menechino* v. *Warden*, 27 N.Y. 2d 449 (1971) the New York Court of Appeals had ruled favorably on claims relating to censureship and representation by counsel at parole revocation hearings. Respondent might also have cited *People ex rel. Brown* v. *Johnston*, 9 N.Y. 2d 482 (1961) and *Matter of Brown* v. *McGinnis*, 10 N.Y. 2d 531 (1962) decided by the Court of Appeals. In the former the Court held that habeas corpus lies to challenge the place of confinement. The latter directed the Commissioner of Correction to permit free exercise of religion.*

It is evident that generalizations about the lack of sympathy of New York judges are unwarranted, particularly since the Courts of New York have shown themselves consistently responsive to changes in constitutional interpretation—even when changes in the law have required them to review and reverse their *own* proceedings.

---

* In addition, the State submitted to the Circuit Court a group of unreported decisions gathered from files of this office throughout the State granting relief to prisoners raising all types of claims. Significantly, in many of the cases the inmates were represented by counsel.

See, e.g., People v. *Huntley*, 15 N.Y. 2d 72 (1965) (dec'd. in light of *Jackson* v. *Denno*, 378 U.S. 368 [1964]); *People* v. *Kessler*, 17 N.Y. 2d 174 (1966) (dec'd. in light of *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844 [2d Cir. 1965], *cert. denied sub nom. Mancusi* v. *Hetenyi*, 383 U.S. 913); *People* v. *Cornish*, 21 A.D. 2d 280 (1st Dept. 1964) (dec'd. in light of *United States ex rel. La Near* v. *LaVallee*, 306 F. 2d 417 [2d Cir. 1962]); *People* v. *Bonino*, 1 N.Y. 2d 752 (1956) (dec'd. in light of *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698 [2d Cir. 1955]).

In any event, a claim that state prisoners receive a more favorable reception in the federal courts, no matter how unwarranted, has no place in the consideration of the requirement for exhaustion in the state courts. So long as the state courts provide a ready remedy in *these* cases, this Court should not be diverted by any captious assessment of the result reached in a particular case decided by a state court any more than it would be by the result in a case decided in the District Court.

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, September 8, 1972.

Respectfully submitted,

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The State of New York has been authorized by the Attorneys General of the following states to list them as joining with us in our brief on the merits.

Honorable William J. Baxley	Alabama
Honorable Ray Thornton	Arkansas
Honorable Gary K. Nelson	Arizona
Honorable Evelle J. Younger	California
Honorable Robert K. Killian	Connecticut
Honorable Robert L. Shevin	Florida
Honorable Arthur K. Bolton	Georgia
Honorable Theodore L. Sendak	Indiana
Honorable Vern Miller	Kansas
Honorable William J. Guste, Jr.	Louisiana
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Honorable Vernon B. Romney	Utah
Honorable Chauncey H. Browning, Jr.	West Virginia

EXHIBIT "A"

Order.

STATE OF SOUTH CAROLINA,

COUNTY OF RICHLAND.

COURT OF GENERAL SESSIONS

CARL SELLERS, ROBERT LAMBERT, WAYNE WALKER, DANNY GRIFFIN and DAN BELL, JR.,

Petitioners,

vs.

THE STATE OF SOUTH CAROLINA,

Respondent.

This matter came before me on the petition of Carl Sellers, Robert Lambert, Wayne Walker, Danny Griffin and Dan Bell, Jr. seeking relief from action of the Adjustment Committee of the Central Corrections Institution which as a result of hearings held on October 8, 1971 by that committee, revoked all good time of the petitioners and segregated the petitioners from the remainder of the prison population by placing the petitioners in the maximum security section of the Central Corrections Institution.

All the petitioners were present and represented by counsel, and the court heard the testimony of all the petitioners and other witnesses presented by the petitioners and by the State of South Carolina.

From the testimony of the State's witnesses, Jessie W. Strickland, Warden, Central Corrections Institution and George Martin, Deputy Warden, Central Corrections Institution, it appears:

Exhibit "A"

That the officials at the Central Corrections Institution first learned of the offenses allegedly committed by Carl Sellers, Robert Lambert, Wayne Walker, Danny Griffin and Dan Bell, Jr. from a fellow inmate of the petitioners from whom a statement was taken by prison officials and acting on this statement further investigation was undertaken by the above named deputy warden, George Martin and Chief H. L. Williams, Chief Correctional officer of the Central Correctional Institution; and

That this further investigation consisted of approaching other inmates and soliciting further statements implicating the petitioners; and

That once the investigation had reached the point where charges were placed against the petitioners, the petitioners were given written notice that they were charged with the crime of assault and rape of an inmate or inmates at some time prior to September 23, 1971 in various parts of cell block #1; and

That neither the times, places, dates or the names of victims were furnished to the petitioners and that at no time were they allowed outside their cells in order to conduct any investigation into the charges placed against them; and

That on October 8, 1971, the petitioners were individually brought before the Adjustment Committee for a hearing and that a member of the Committee was Deputy Warden, George Martin, who had participated in the investigation, and that Chief Correctional Supervisor, H. L. Williams, who had carried the main brunt of the investigation of the charges was present both during the hearing and during the decision-making process following the hearing; and

That the hearing and decision-making process were summary in nature and lasted no more than 10 to 15 minutes at the most for each petitioner involved; and

That witnesses Strickland and Martin testified that the danger of retribution against the inmates who had impli-

Exhibit "A"

ated the petitioners was so great that it was necessary that their names be kept from the petitioners even though at the time of the hearing all of the inmates who had given statements against the petitioners were either released into society or were in another prison facility geographically separate from the Central Correctional Institution where the petitioners were incarcerated.

Therefore, I find that the uncontroverted testimony of both the witnesses for the state and of the Petitioners vividly demonstrates that the petitioners were not allowed even minimal procedural safeguards in a hearing that could result and did result in the loss of statutory good time they had acquired prior to the alleged offenses, as well as indefinite segregation in the maximum security portion of the prison; and

That the petitioners are given by statute the right to acquire early release through acquisition of good time and that by statute the director of the Central Corrections Institution has within his discretion the right to take away statutory good time.

However, discretion can be abused, and I find and conclude that the procedure described by the petitioners and by the witnesses for the state demonstrates that a "star chamber" atmosphere pervaded the entire investigation and hearings of the Adjustment Committee, and further, that the danger of retribution against the victims and informants feared by the prison officials was not sufficient justification for the complete deprivation of procedural safeguards to which the petitioners are entitled.

However, I find that the restrictions imposed upon these petitioners by the Adjustment Committee by placing them in administrative segregation were within the power of the Adjustment Committee to maintain order, discipline and security; and

Further, I find that the action of the Adjustment Committee with the respect of the loss of the good time im-

posed upon the petitioners, Carl Sellers, Robert Lambert, Wayne Walker, and Danny Griffin was taken without minimal procedural protection for the petitioners; and it is therefore

ORDERED that petitioners earned good time, as provided by statute be, and hereby is, restored to the Petitioners, Carl Sellers, Robert Lambert, Wayne Walker and Danny Griffin. Petitioner Dan Bell, Jr. is not affected by this order since at the time of the alleged offense and at the time of the Adjustment Committee hearing he had not accrued any good time, having lost it for a previous infraction.

IT IS SO ORDERED.

s/ John Grimbal
JOHN GRIMBALL
Judge, 5th Judicial Circuit

Columbia, South Carolina
February 1, 1972.

Attest:
A True Copy

John R. T. Mayer
G.C.G.F. & G.S.
JG

EXHIBIT "B"

Part 261, Time Allowance Committees.

Historical Note

Part (§§ 261.1-261.3) added, filed Sept. 17, 1970 eff. Oct. 19, 1970.

Section 261.1. Establishment of time allowance committees. (a) There shall be in each correctional facility a committee to be known as the "time allowance committee".

(b) Such committee shall consist of: the deputy superintendent of the facility; the person in charge of industries therein; the person in charge of education therein; and the physician. In a facility where it would be impracticable to have a committee so composed, the superintendent shall apply to the commissioner for an order designating the composition of the committee. Where a member of a time allowance committee is unable to attend a meeting, the employee who would normally assume his duties shall be his alternate and shall act in his place.

(c) Each such committee shall have a chairman designated by the superintendent from among the members and the chairman shall be responsible for the proper operation of the committee.

261.2 Role of time allowance committees. The purpose of the time allowance committee shall be to make recommendations as to the amount of good behavior allowance to be granted to inmates who are eligible to be considered for such allowance.

261.3 Procedure of time allowance committees. (a) The file of each inmate who is serving an indeterminate sentence and who is entitled to be considered for good behavior allowance shall be considered at least once in each three

year period during the time of his incarceration, and for this purpose all jail time and other credits against the sentence shall be calculated as part of the first three year period, or where the incident leading to the credit occurs at a subsequent time the credit shall be calculated as part of the first three year period following the occurrence of such incident.

(b) Irrespective of when the last consideration of the file of an inmate serving an indeterminate sentence may have occurred, the file of each such inmate shall be considered not more than three nor less than two months before the earliest possible date he would be entitled to consideration for parole or conditional or other release if that date depends upon the amount of good behavior allowance to be granted (based upon the assumption that he has earned all good behavior allowances that can be granted). In any case where the triennial review required by subdivision (a) of this section would occur within 12 months of the review required by this subdivision (b), the triennial review need not be conducted.

(c) Where an inmate is serving a definite sentence of imprisonment with a term of one year or less, the committee shall review his file not more than six nor less than two weeks before the earliest possible date he would be entitled to release (based upon the assumption that he has earned all good behavior allowances that can be granted).

(d) The commitee shall consider the entire file of the inmate and shall interview the inmate and then shall decide upon a recommendation as to the amount of good behavior allowance to be granted, applying the principles set forth in sections 260.3 and 260.4 of this Part.

(e) The committee shall not recommend the granting of the total allowance authorized by law or the withholding of any part of the allowance in accordance with any auto-

Exhibit "B"

matic rule, but shall appraise the entire institutional experience of the inmate and make its own determination.

(f) The committee shall promply report the results of its deliberations in writing to the superintendent. Such report shall set forth its recommendation for the time to be allowed for the period under consideration and the reasons for the recommendation.

(g) Where time has been declared lost in a determination of a superintendent's proceeding, such time shall be excluded from the amount the committee is authorized to recommend for allowance, but on the last consideration to occur before the earliest parole or conditional or other release date, the committee shall consider whether, and set forth its recommendation as to whether the inmate's subsequent behavior merits restoration of all or part of the lost allowance and its reasons therefor.

(h) All recommendations of the committee shall be pursuant to a decision of a majority of the members, but any member who disagrees shall note his recommendations and the reasons therefor on the report of the committee. Where a majority of the members are unable to agree upon a recommendation, the chairman shall report such fact and each member shall report his recommendation and his reasons in the report made by the chairman.

FILED
NOV 30 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

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INDEX.

	PAGE
Opinions and Orders Below	1
Jurisdiction	2
Question Presented	2
Statement	3
Summary of Argument	3
Argument	7
I. The State's claim requires repudiation of a long and uniform series of decisions by this and virtually all other courts	7
A. The State's claim is unprecedented in scope	7
1. The scope of the State's contention	9
2. The rational for the State's contention	10
B. The State's claim is barred by governing precedent and the purpose of the exhaustion requirement	11
II. An exhaustion requirement will not substantially reduce federal-state friction or the federal court burden, and will not benefit the prisoner	17
A. An exhaustion requirement will not reduce federal-state frictions	17
1. Prison-condition cases do not raise "unique" problems for § 1983 jurisdiction	17
2. State courts do not have a special role in prison-condition suits	21
3. Exhaustion limited to release or good time cases produces irrational disparities	25
4. Exhaustion of administrative remedies is precluded by Houghton v. Shafer, *supra*, and is not raised by the cases at bar	27

PAGE

B. The federal courts' burden will not be appreciably lightened by exhaustion 27

1. Exhaustion cannot substantially reduce the federal court case load 27

2. A significant number of prisoners rights claims are meritorious 29

C. The prisoner will not benefit from an exhaustion requirement 31

Conclusion 37

Table of Cases.

Baker v. Grice, 169 U. S. 284, 291 (1891) 13
Blazic v. Fay, 21 A. D. 2d 817 (2d Dept. 1964) 35
Bloeth v. Cyrta, 39 Misc. 2d 1039, 242 N. Y. S. 2d 307 (Sup. Ct. Suff. 1963) 34
Brabson v. Wilkins, 19 N. Y. 2d 433 (1967) 18, 34
Brown v. Allen, 344 U. S. 443 (1953) 14
Cammack v. Fritz, ___ Misc. 2d ___ (Sup. Ct. Cay. 12/23/70) 34
Carafas v. LaVallee, 391 U. S. 234 .....11, 12
Carothers v. Follette, 314 F. Supp. 1014 (S. D. N. Y. 1970) 16
Casey v. Fay(22 A. D. 2d 941 (2d Dept. 1964) 35
Catanzaro v. Martin, 238 A. D. 914, 130 N. Y. S. 2d 200 (4th Cir. 1954) 35
Childs v. Pegelow, 321 F. 2d 487 (4th Cir. 1963) 18
Church v. Hegstrom, 416 F. 2d 449 (2d Cir. 1969) 30
Coffin v. Reichard, 143 F. 2d 443 (6th Cir. 1944) 11, 12
Cooper v. Pate, 378 U. S. 546 (1964) 8, 11, 16
Cruz v. Beto, 405 U. S. 319 (1972) 8, 16
Cruz v. Hauck, 404 U. S. 59 (1971) 8, 16
Darr v. Burford, 339 U. S. 200, 204 (1950) 13, 14
Edwards v. Lynch 15
Edwards v. Schmidt, 321 F. Supp. 68, 71-75 (W. D. Wis. 1971) 12, 13, 17
England v. La. St. Bd. of Med. Examiners, 375 U. S. 411, 416-17 (1963) 21
Fay v. Noia, 372 U. S. 391, 419-20 (1963) 13
Haines v. Kerner, 404 U. S. 249 (1972) 8, 16
Harris v. Nelson, 394 U. S. 286 (1969) 24, 32

PAGE

Ex Parte Hawk, 321 U. S. 114, 116-117 (1944) 13
Hewson v. State of New York, 27 A. D. 2d 358 (4th Dept.) appeal dismissed, 20 N. Y. 2d 758 (1967) ..22, 23
Holmes v. N. Y. City Housing Authority, 398 F. 2d 262, 265 (2d Cir. 1968) 19
Houghton v. Shafer, 392 U. S. 639 (1968) .5, 6, 12, 16, 18, 27
Howard v. Smyth, 365 F. 2d 428 (4th Cir. 1966) 16
Humphrey v. Cady, 405 U. S. 504, 516-17 n. 18 (1972) 2, 3, 8, 15, 39
Inmates of Attica v. Rockefeller, 453 F. 2d 12 (2d Cir. 1971) 30
Johnson v. Avery, 252 F. Supp. 783 (M. D. Tenn. 1966); rev'd on other grounds, 382 F. 2d 353 (6th Cir. 1967); rev'd, 393 U. S. 483 (1969) 11
Jones v. Decker, 436 F. 2d 955 (5th Cir. 1970) 9, 15, 16
Jones v. Fritz, ____ Misc. 2d ____ (Sup. Ct. Cay. 2/9/71) 34
Ex Parte Kieffer, 40 Fed. 399 (C. C. D. Kan. 1889) 35
Lake Carriers Ass'n v. MacMullen, 406 U. S. 498 (1972) 26
Landman v. Peyton, 370 F. 2d 135 (4th Cir. 1966) 16
Landman v. Royster, 333 F. Supp. 621, 650-51 (E. D. Va. 1971) 15
Lee v. Washington, 390 U. S. 333 (1968) 8, 16
Lynch v. Household Finance Corp., 405 U. S. 538 (1972) 14, 22, 26
McDonald v. Board of Elections, 394 U. S. 802 (1969) .8, 16
McNeese v. Board of Education, 373 U. S. 668 (1968) 19
Mead v. Parker, 464 F. 2d 1108 (9th Cir. 1972 36
Medlock v. Burke, 285 F. Supp. 67, 69 (D. Wis. 1968) .. 16
Mitchum v. Foster, 407 U. S. 225 especially 238-43 (1972) 14, 26, 38
Monroe v. Pape, 365 U. S. 167 (1961) 5, 11, 22, 30, 33
Morris v. Wingo, 421 F. 2d 651 (6th Cir. 1970) 17
Morrissey v. Brewer, 408 U. S. 471 (1972) 16, 17
Nolan v. Scafati, 430 F. 2d 548 (1st Cir. 1970) 16
O'Brien v. McGinnis, 311 N. Y. S. 2d 553 (S. Ct. Alb. 1970) 22
Padilla v. Ackerman, 460 F. 2d 477, 478-79 (9th Cir. 1972) 15
People *ex rel.* Cataliotti v. Lavallee, ____ Misc. 2d ____ (Sup. Ct. Clin. 1969) 34
People *ex rel.* Cunningham v. Fritz, ____ Misc. 2d ____ (Sup. Ct. Cay. Dec. 29, 1970) 34

PAGE

People *ex rel.* Diaz v. Fritz, ____ Misc. 2d ____ (Sup. Ct. Cay. Dec. 29, 1970) 34
People *ex rel.* Memechino v. Warden, 27 N. Y. 2d 449 (1971) 35
People *ex rel.* George Rudder v. Fritz, ____ Misc. 2d ____ (Sup. Ct. Cay. Dec. 29, 1970) 34
People *ex rel.* Scarola v. Jackson, 276 A. D. 939, 94 N. Y. S. 2d 251 (3d Dept. 1950) 35
Ray v. Oswald, ____ F. 2d ____, 72-1455 (2d Cir. 10/19/72) 9, 15, 23, 28
Rochin v. California, 343 U. S. 165 (1952) 30
Ex Parte Royall, 117 U. S. 241 (1886) 12, 13, 14
SaMarion v. McGinnis, 35 A. D. 2d 684, 314 N. Y. S. 2d 715 (4th Dept. 1970) 37
Sostre v. McGinnis, 334 F. 2d 906 (2d Cir. 1964) 37
Sostre v. McGinnis, 442 F. 2d 178, 182 (2d Cir. 1971) (*en banc*), cert. denied *sub nom.* Oswald v. Sostre, 404 U. S. 1049 (1972) 12, 15, 30, 34
Strowder v. Shevlin, 380 F. 2d 370 (3d Cir. 1967), 368 F. 2d 954 (3d Cir. 1966) 16
Thomas v. Teets, 205 F. 2d 236, 240 (9th Cir.) cert. denied, 346 U. S. 910 (1953) 35, 36
U. S. *ex rel.* Campbell v. Pate, 401 F. 2d 55, 57 (7th Cir. 1969) 16
U. S. *ex rel.* DeVita v. McCorkle, 216 F. 2d 734, 744 (3d Cir. 1954) 35
U. S. *ex rel.* Hancock v. Pate, 223 F. Supp. 202 (N. D. Ill. 1968) 16
U. S. *ex rel.* Mosher v. McMann, 460 F. 2d 126, 132 (2d Cir. 1972) 16
U. S. *ex rel.* Schuster v. Herold, 410 F. 2d 1071, 1083-89 (2d Cir. 1969) 16
U. S. *ex rel.* Stevenson v. Mancusi, 325 F. Supp. 1028, 1031 (W. D. N. Y. 1971) 31
Wilwording v. Swenson, 404 U. S. 249 (1971) ...2, 3, 7, 11, 15, 17, 18, 39
Wright v. McMann, 321 F. Supp. 127, 134-35 (N. D. N. Y. 1970), aff'd in part, rev'd in part, 460 F. 2d 126 (2d Cir. 1972) 28
Wright v. McMann, 387 F. 2d 519 (2d Cir. 1967), on remand, 460 F. 2d 126 (2d Cir. 1972) 29, 34
Younger v. Gilmore, 404 U. S. 15 (1971) 8, 16
Younger v. Harris, 401 U. S. 37, 44 (1971) 14
Zwickler v. Koota, 389 U. S. 241, 248 (1967) 21, 26

Statutes.

PAGE

Civil Rights Act, 42 U. S. C. § 1983 .....2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 19, 21, 22, 24, 26, 27, 29, 30, 32, 36
New York CPLR 7002(c)1 34
N. Y. Civ. Rts. L. § 79-c 29, 33
N. Y. Corr. L. §§ 803, 804 25
N. Y. Pen. L. § 75.00 25
28 U. S. C. § 1254(1) 2
28 U. S. C. § 1651 36
28 U. S. C. § 2241 .....9, 10, 11
28 U. S. C. § 2254(b) 4, 10, 11, 12, 13, 14, 16, 17
28 U. S. C. § 2283 .....14, 26

Miscellaneous.

A New Partnership in Corrections, Address before 102nd Congress of the American Correctional Association, p. 5 (Aug. 21, 1972) 19
ABA Minimum Standards Relating to Sentencing Alternatives and Procedures 278 (1967) 21
Address by Chief Justice Burger, Centennial Convention of the Ass'n of the Bar of the City of New York, Feb. 17, 1970, in 25 Record of N. Y. C. B. A. 14, 15 (Supp. March 1970) 37
Amsterdam, Criminal Prosecution Affecting Federally Guaranteed Civil Rights: Federal Removal of Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793, 890-91, 902 (1965) 14, 33, 36
Burger, No Man Is an Island, 56 A. B. A. J. 325 (1970) . 37
Chevigny, Section 1983 Jurisdiction: A Reply, 83 Harv. L. Rev. 1352, 1358-60 (1970) 33
Goldfarb and Singer, Redressing Prisoners' Grievances, 39 Geo. Wash. L. Rev. 175, 183-84 (1970) ..11, 29
I Farrand, The Records of the Federal Convention of 1787 at 124 (1937) 33
Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171, 172-73 (1948) 13, 14

PAGE

Note, Beyond the Ken of the Courts, 72 Yale L. J. 506 (1962) 18
Note, Developments in the Law-Habeas Corpus, 83 Harv. L. Rev. 1038, 1093 (1970) 12, 29
Note, Exhaustion of State Remedies Under the Civil Rights Act, 68 Colum. L. Rev. 1201, 1205-06 (1968) .. 24
Note, Limiting the Section 1983 Action in the Wake of Monroe v. Pape, 82 Harv. L. Rev. 1486 (1969) 24
Note, Multi-party Federal Habeas Corpus, 81 Harv. L. Rev. 1482 (1968) 24
Note, The Burden of Federal Habeas Corpus Petitions from State Prisoners, 52 Va. L. Rev. 486 (1966) 29
Note, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 950-51, 1018-28 (1970) 23
Note, 83 Harv. L. Rev. at 1100 36
Report of New York State Special Commission on Attica 2-102 (1972) 30
Singer, Bringing the Constitution to Prison: Substantive Due Process and the Eighth Amendment, 39 U. Cin. L. Rev. 650, 651 (1970) 37
The Federalist No. 80 passim 33
The Federalist No. 81, at 528 (Mod. Lib. ed. 1941) 33
Zeigler & Hermann, The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts, 47 N. Y. U. L. Rev. 157, 171 n. 47 (1972) 12, 28, 29, 31, 32

IN THE

Supreme Court of the United States

October Term, 1972

No, 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LaVALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

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BRIEF FOR RESPONDENTS

Opinions and Orders Below

The *in banc* decision of the Court of Appeals is reported at 456 F. 2d 79 and is reproduced in the Appendix commencing at page 113a. The order to *in banc* is set forth in the Appendix at page 112a.

The decision of the panel which initially decided the *Rodriguez* case is reported at 451 F. 2d 730. It is re-

produced in the Appendix commencing at page 28a. The District Court opinion in *Rodrigues* is reported at 307 F. Supp. 627 and is included in the Appendix commencing at page 18a.

The opinion of the Second Circuit panel which initially decided the *Katzoff* case is reported at 441 F. 2d 558 and is included in the Appendix commencing at page 84a. The District Court opinion in *Katzoff* has not been officially reported. A copy is included in the Appendix commencing at page 62a.

No decision was rendered by the panel which heard the appeal in the *Kritsky* case. The opinion of the District Court is reported at 313 F. Supp. 1247 and is reproduced in the Appendix commencing at page 104a.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1). The judgment of the Court of Appeals was entered on January 25, 1972. The petition for certiorari was filed on April 24, 1972. Certiorari was granted on June 19, 1972.

Question Presented

Should this Court repudiate its decisions in *Wilwording v. Swenson*, 404 U. S. 249 (1971), *Humphrey v. Cady*, 405 U. S. 504, 516-17 n. 18 (1972) and other recent decisions, and deny state prisoners the right to challenge unconstitutional prison conditions under the Civil Rights Act, 42 U. S. C. § 1983?

Statement

Respondents accept the Statement in the brief for petitioners (hereafter "the State") as substantially correct, with two relatively minor exceptions set forth in the margin.[1]

Summary of Argument

Just last term, in *Wilwording v. Swenson*, 404 U. S. 249 (1971), and *Humphrey v. Cady*, 405 U. S. 504, 516-17 n. 18 (1972), this Court reaffirmed the well-established principle that state prisoners can challenge prison conditions under 42 U. S. C. § 1983 without exhausting either state judicial or administrative remedies. In *Wilwording*, the Court said: "State prisoners are not held to any stricter standard of exhaustion than any other civil rights plaintiffs." 404 U. S. at 251-52. The State would have the Court repudiate that well-established principle and require all state prisoner challenges to prison conditions to be treated as habeas corpus petitions, which would be barred if state judicial

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[1] (1) The State asserts that Judge Feinberg believed there were "overwhelming numbers of 'frivolous prisoner petitions,'" and that "some fair way of dealing with the problem is called for." (Br. 13). (All references to the State's brief will be "Br.___.") In fact, however, Judge Feinberg said "*If* the already overburdened federal courts are being overwhelmed by frivolous prisoner petitions . . ." (App. 12a) (emphasis added).

(2) The State described the district court's opinion in *Rodrigues* as having "*specifically* turned on the failure of the Prison Commutation Board to . . . advise the Commissioner of Correction in writing of its reasons for disallowance of good behavior time." (Br. 7) (emphasis added). In fact, however, the district court found several specific defects in the disciplinary procedures, but relied on the "failure . . . to advise" as the "chief basis." (App. 26a). See also Waterman, J., dissenting (App. 34a-42a).

It may also be worth noting that the derogatory diary entries for which Katzoff was punished with 60 days in solitary confinement and 60 days loss of good time were "creep" and "cigar-smoking s. o. b." (App. 86a).

remedies had not been first exhausted; in addition, the State would also have state prisoners exhaust state administrative remedies as well.

These requirements are not only stricter than those imposed on other civil rights plaintiffs, but also stricter than those facing almost all other federal litigants. The State's contention is barred by *stare decisis*, as well as by the history and purpose of the exhaustion requirement and the policies of the Civil Rights Act. Furthermore, such exhaustion would not significantly reduce federal-state friction or the federal courts' burden, and would not benefit the state prisoner in the slightest. Instead, it might well eliminate all meaningful scrutiny of prison officials' actions.

1.a. It is clear from the history and policies of 28 U. S. C. § 2254 (b) that exhaustion is required in order to avoid friction between federal and state *courts*, not between federal courts and state administrative agencies, the only state actions that are at issue in prison conditions cases. Exhaustion is thus properly limited to collateral attacks on state court convictions and perhaps also to other direct conflicts with state court judgments.

b. It is for this reason that numerous prison conditions cases in this Court and elsewhere have been brought under § 1983 without even a challenge to the jurisdiction, and why all of the cases where that challenge has been made, have rejected it.

2. An exhaustion requirement would not reduce federal-state friction but, on the contrary, might increase it.

a. In the first place, prison-conditions suits are not "unique" in their potential for federal-state friction, but are very similar to other actions under § 1983 challenging state official action. Moreover, all challenges to state ac-

tion have special problems, but this Court has never accepted such an argument, even though persistently pressed in virtually every type of § 1983 suit, including a recent prison suit. *Houghton v. Shafer*, 392 U. S. 639 (1968).

Whatever special considerations might exist in prison-conditions cases are essentially *administrative*, and state courts are no better equipped to handle these cases than federal courts, as the long history of the "hands-off" doctrine in state courts indicates.

The fact that confinement results from a state court process of conviction and sentence is not significant. For one thing, that latter fact does not define a clearly delineated category. For example, does it include suits at the beginning of the criminal process, such as police abuse cases, see *Monroe v. Pape*, 365 U. S. 167 (1961)? Does it include actions after confinement, such as suits for damages after release, or against post-release disabilities? On the other hand, does it exclude conditions in pre-trial detention facilities? Does it exclude damages suits in general, especially where no damages remedy exists in state courts? Moreover, most state courts lose jurisdiction over prisoners after judgment, and, as the long history of the "hands-off" doctrine shows, retain virtually no interest.

b. Injecting state courts into the process may *increase* federal-state friction, for it will introduce single-judge federal review of state high-court decisions, whereas now the review is only of state administrative actions. The experience with habeas corpus indicates that friction results primarily from the former type of review, and despite the existence of an exhaustion requirement.

c. Limiting the State's claim to prisoner complaints for release from custody because of unconstitutional administrative action, as the State originally urged, produces irra-

tional differences, for it makes the availability of § 1983 depend on: (1) fortuities of timing, *i.e.*, whether the action is brought at a time when restoration of good time will result in immediate release under state law; (2) fortuities of punishment, *i.e.*, whether the suit is in response to a good time penalty, instead of being anticipatory, declaratory, for damages, or in response to other types of penalties, such as loss of privileges. Abstention is precluded because these cases do not usually raise state-law issues that might obviate consideration of the federal claim.

d. Exhaustion of administrative remedies is precluded by *Houghton v. Shafer*, 392 U. S. 639 (1968), and, in any event, is not raised by the facts of these cases.

3. Exhaustion cannot substantially reduce the federal courts' burden of frivolous or petty cases. For one thing, unsuccessful state challenges will wind up in the federal courts sooner or later. If damages actions are excluded from the exhaustion requirement, as the Court of Appeals below has held, then exhaustion will be easily avoided right at the start by simply adding a claim for damages, as so many prisoners already are doing. That an exhaustion requirement cannot reduce the federal court burden can be seen from the experience with habeas corpus, where the reduction came only after some of the applicable legal principles had developed.

It is also important to note that a significant number of prison conditions cases are meritorious, as the cases at bar and many others show. Thus, even the dissenters below would exempt certain "shocking" cases from exhaustion. The State's position would bar federal review of all cases until long after the fact; given current state court attitudes, this would effectively bar all meaningful judicial scrutiny, which is precisely what the State has sought not only in this case, but elsewhere.

4. Prisoners will not be better off with the State's position. Not only will they be denied a federal forum at a time that the facts are fresh, but they may lose it altogether by the passage of time or by *res judicata*, where damages are concerned. Moreover, they gain nothing from the habeas corpus remedy—it is not swifter or more flexible than § 1983 (apart from the delay in getting to federal court in the first place) and there are many uncertainties about its procedural attributes, such as the availability of class action or discovery.

ARGUMENT

I. The State's claim requires repudiation of a long and uniform series of decisions by this and virtually all other courts.

A. The State's claim is unprecedented in scope.

Just last year, in *Wilwording v. Swenson*, 404 U. S. 249 (1971), this Court declared:

> "Petitioners were therefore entitled to have their actions treated as claims for relief under the Civil Rights Acts, not subject, on the basis of their allegations, to exhaustion requirements. The remedy provided by these Acts 'is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' Monroe v. Pape, 365 U. S. 167, 183, 5 L. Ed. 2d 492, 503, 81 S. Ct. 473 (1961); McNeese v. Board of Education, 373 U. S. 668, 10 L. Ed. 2d 622, 83 S. Ct. 1433 (1963); Damico v. California, 389 U. S. 416, 19 L. Ed. 2d 647, 88 S. Ct. 526 (1967). *State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs.* Houghton v. Shafer, 392 U. S. 639, 20 L. Ed. 2d 1319, 88 S. Ct. 2119 (1968). There an inmate's challenge to the confiscation of his legal materials without first seeking administrative redress was sustained. Although the

> probable futility of such administrative appeals was noted, we held that in 'any event, resort to these remedies is unnecessary.' Id. at 640." 404 U. S. at 251-52 (emphasis added).

Just a few months later, the Court reaffirmed this principle when it noted that "some or all of [a Wisconsin prisoner's challenges to his commitment to a "sex deviate facility"] may be treated as claims for relief under the Civil Rights Act, 42 U. S. C. § 1983, in which case no exhaustion is required. Wilwording v. Swenson, *supra*." *Humphrey v. Cady*, 405 U. S. 504, 516-17 n. 18 (1972).

And in the same and past terms, this Court considered and disposed of numerous prison-condition cases under 42 U. S. C. § 1983, without requiring or even discussing exhaustion of prior state remedies. *E.g., Haines v. Kerner*, 404 U. S. 249 (1972); *Cruz v. Beto*, 405 U. S. 319 (1972); *Younger v. Gilmore*, 404 U. S. 15 (1971); *Cruz v. Hauck*, 404 U. S. 59 (1971); *McDonald v. Board of Elections*, 394 U. S. 802 (1969); *Lee v. Washington*, 390 U. S. 333 (1968); *Cooper v. Pate*, 378 U. S. 546 (1964).

Despite this clear language and uniform line of recent precedents, the State is explicitly asking this Court to hold that state prisoners do have lesser rights to a federal forum than other litigants under 42 U. S. C. § 1983 and, unlike other such litigants, must exhaust all state remedies before availing themselves of a federal forum. Surely, if *stare decisis* means anything, such a claim must be rejected.

1. ***The scope of the State's contention.***

It is important at the outset to delineate the full dimensions of the State's claim,[2] which can be seen from the following typical example: If a state prisoner wants to challenge physical brutality and to seek damages therefor, under the State's approach he must:

1. Exhaust administrative remedies (Br. 32-34).

2. If unsuccessful administratively, he must file in the state trial court and then participate in all the necessary appeals;

3. If unsuccessful after all the state administrative and court proceedings, he may then go into federal district court under 28 U. S. C. § 2241;

4. If he is successful in federal court and is entitled to damages, he must bring or join a separate action under 42 U. S. C. § 1983 since damages are not available in a habeas corpus action. Furthermore, even if there is no state damages remedy (as in New York), the State would still require the prisoner to go first into state court on the substantive merits. If his state suit is successful, he may then go into federal court under 42 U. S. C. § 1983 for his damages, (Br. 40), though apparently without filing a federal habeas petition. *But see, Ray v. Oswald*, ____ F. 2d ____, 72-1455 (2d Cir. 10/19/72); *Jones v. Decker*, 436 F. 2d 955 (5th Cir. 1970) (damage actions allowed in federal court without prior resort to state court).

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[2] Originally the State seems to have argued only that where a federal court decision would result in immediate release from custody, habeas corpus is the only appropriate remedy. Brief for Respondents-Appellants in *Katzoff* in Second Circuit, pp. 7-10. This was also the initial basis for decision in the Court of Appeals, see App. 31a (*Rodriguez*), 87a (*Katzoff*). On the *in banc* hearing, however. the State expanded this narrow position, and asked the Court to rule that *all* prisoner cases be treated as habeas corpus petitions.

2. *The rationale for the State's contention.*

The State asserts the following:

a. The words "in custody" in §§ 2241 and 2254(b), include not merely the fact or duration of custody, but also the manner and conditions thereof.

b. Such a reading is appropriate because:

(1) *Comity requires it.* Without exhaustion of the type requested, there will be federal-state friction over prison issues. "The concern for the role of the state courts in reviewing prisoner complaints has particular relevance because the claims asserted arise as a direct consequence of the process of state conviction and sentence." (Br. 28) Furthermore, prisons are unique in the pervasiveness of the supervision and the consequent possibility of numerous federal claims. State courts must be allowed a role in the development of the governing federal law (Br. 26); they are in a better position, geographically and otherwise, to determine these claims. (Br. 32)

The State seems also to assert that administrative remedies must also be exhausted to allow prison administrators the initial opportunity to see that any "new procedures are being properly and consistently implemented." (Br. 31)

(2) *The federal court burden.* Unless such exhaustion is required, the federal courts will be overburdened with numerous frivolous applications, which are multiplying many times. (Br. 35)

(3) *The prisoner is better off* with habeas corpus than with 42 U. S. C. § 1983 because the habeas corpus remedy is both more flexible and more expeditious (Br. 35-39). The possibility of losing a federal forum is not a valid consideration (Br. 42-45), and the state courts are providing adequate remedies, though the actual substantive results in such cases are not relevant (Br. 47).

The State's reading of the statute and its reasons for such a reading are not supportable. To confine prisoners' claims about conditions to habeas corpus and to single them out for exclusion from the rights and remedies afforded by § 1983 is to ignore the history and purposes of both statutes. Such a ruling would also create inconsistencies and incongruities in the processing of prisoners' complaints with few, if any, benefits.

B. The State's claim is barred by governing precedent and the purpose of the exhaustion requirement.

From a purely linguistic aspect, the words "in custody in violation of the constitution" in 28 U. S. C. §§ 2241 and 2254 probably could be stretched to accommodate the conditions of custody, as well as the fact and duration of that custody, though such a stretch would hardly be a "plain meaning" reading; a few courts have accepted habeas jurisdiction of complaints about prison conditions as the State rightly points out. See, *e.g.*, *Coffin v. Reichard*, 143 F. 2d 443 (6th Cir. 1944); *Johnson v. Avery*, 252 F. Supp. 783 (M. D. Tenn. 1966); *rev'd on other grounds*, 382 F. 2d 353 (6th Cir. 1967); *rev'd*, 393 U. S. 483 (1969); *Wilwording v. Swenson*, *supra*.[8] It would do violence to both the nature of habeas corpus and the purpose of exhaustion, however, to introduce that requirement into remedies which do not threaten the values it is designed to protect.

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[8] Habeas corpus relief originally may have been made available because there was no other remedy for in-prison abuses before the resurrection of § 1983 in *Monroe v. Pape*, 365 U. S. 167 (1961) and the affirmation of its availability for prisoners in *Cooper v. Pate*, 378 U. S. 546 (1964). See Goldfarb and Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH L. REV. 175, 183-84 (1970).

The State's speculation that the parallelism of remedies results from uncertainty as to the availability of habeas corpus prior to the 1968 decision in *Carafas v. LaVallee*, 391 U. S. 234 (Br. 17) is

(Footnote continued on following page)

The State offers little discussion of the background and history of 28 U. S. C. § 2254(b), except for a brief reference to *Ex Parte Royall*, 117 U. S. 241 (1886). The fact is, however, that § 2254(b) has generally been construed to require exhaustion "to avoid upsetting state court *convictions*." Note, *Developments in the Law—Habeas Corpus*, 83 Harv. L. Rev. 1038, 1093 (1970), (emphasis added). See *Edwards v. Schmidt*, 321 F. Supp. 68, 71-75 (W. D. Wis. 1971) (detailed analysis of legislative and judicial history of § 2254(b)); *Sostre v. McGinnis*, 442 F. 2d 178, 182 (2d Cir. 1971) (*en banc*), *cert. denied sub nom. Oswald v. Sostre*, 404 U. S. 1049 (1972). The language of § 2254(b) quite clearly reflects the special concern and delicacy of challenging "the *judgment* of a state court," not the discretionary decision of a prison officer.

That this special concern for interference with state court convictions underlay the exhaustion requirement, has been clear ever since *Ex Parte Royall, supra*, where exhaustion was first mandated. The explicit rationale of that decision was a concern for interference with the criminal court judgments of state *courts*, not merely state processes in general. Thus, Mr. Justice Harlan wrote:

> "The injunction to hear the case summarily and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred

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(Footnote continued from preceding page)
undermined by the following facts: (1) habeas corpus was known to be available in both federal and state courts long before 1968, see *Coffin v. Reichard, supra* and cases cited at Br. 32; (2) the largest number of § 1983 petitions were filed *after* 1968, see Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N. Y. U. L. Rev. 157, 171 n. 47 (1972); and (3) *Houghton v. Shafer, supra*, which rejected the exhaustion requirement in a prison-conditions case, was decided *after* the *Carafas* case.

upon it. That discretion should be exercised in the light of the relations existing, under our system of government, *between the judicial tribunals of the Union and of the States*, and in recognition of the fact that the public good requires that those relations be not disturbed by *unnecessary conflict between courts* equally bound to guard and protect rights secured by the Constitution." 117 U. S. at 251 (emphasis added).

This concern about federal interference with state court judgments of conviction and sentence has remained the dominant rationale throughout the subsequent 85 years, and, as the opinion in *Edwards v. Schmidt, supra*, indicates, underlay the codification in § 2254 (b). 321 F. Supp. at 74-75. For example, in *Fay v. Noia*, 372 U. S. 391, 419-20 (1963), the rationale of § 2254 (b) was described with the following quotation from *Darr v. Burford*, 339 U. S. 200, 204 (1950):

> "it would be unseemly in our dual system of government for a federal district court to upset a *state court conviction* without an opportunity to the state courts to correct a constitutional violation. . . . Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." 339 U. S. at 204 (emphasis added). See also *Ex Parte Hawk*, 321 U. S. 114, 116-117 (1944); *Baker v. Grice*, 169 U. S. 284, 291 (1891).

The point was made quite explicitly by Judge Parker in 1948 when the comity rule of *Ex Parte Royall* was codified. He stressed that the primary concern was "the unseemly spectacle of federal district courts trying the regularity of proceedings had in courts of coordinate jurisdiction." *Limiting the Abuse of Habeas Corpus*, 8 F. R. D. 171, 172-73 (1948). He pointed to the embarrassment of bringing

in judges as witnesses, and of a single federal judge reviewing the actions of the highest state tribunals. And in support of the position that there be no federal review so long as any state review was still possible (a position rejected in *Brown v. Allen*, 344 U. S. 443 (1953)) he emphasized:

> "the thing to keep in mind in the drafting of this section was to provide that review of *state court action* be had so far as possible only by the Supreme Court of the United States . . . not be had by the lower federal courts whose exercise of such power is unseemly and likely to breed dangerous conflicts of jurisdiction." 8 F. R. D. at 176 (emphasis added).

For a careful analysis of the history and rationale of the exhaustion doctrine in a different context (pre-trial release) see Amsterdam, *Criminal Prosecution Affecting Federally Guaranteed Civil Rights: Federal Removal of Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 890-91, 902 (1965); see generally *id.* at 862-908.

The State's only effort at analysis of these historical and legislative purposes is to quote some of the general language from the above quotation from *Ex Parte Royall*, while ignoring the fact that the case involved an effort to interfere directly with a criminal prosecution already pending before a state *court*.

And in other contexts as well, concern about interference with the direct operation of state *courts* and their judgments, has characterized "our federalism" from the very beginning, as *Younger v. Harris*, 401 U. S. 37, 44 (1971) and 28 U. S. C. § 2283 indicate. And even in the latter instances, some interference is allowed where constitutional rights and § 1983 are concerned. See *Mitchum v. Foster*, 407 U. S. 225 (1972); *Lynch v. Household Finance Corp.*, 405 U. S. 538 (1972).[4]

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[4] The common policies underlying 28 U. S. C. §§ 2283 and 2254(b) are noted in *Darr v. Burford*, 339 U. S. at 204 n. 10.

It is thus not surprising that virtually every court that has explicitly dealt with the problem at issue has ruled that § 1983 is available to prisoners who wish to challenge unconstitutional prison conditions, and that no exhaustion is required. *E.g., Wilwording v. Swenson, supra; Padilla v. Ackerman*, 460 F. 2d 477, 478-79 (9th Cir. 1972); *Sostre v. McGinnis*, 442 F. 2d at 182, *but cf.* 204 n. 50; *Edwards v. Lynch, supra; Landman v. Royster*, 333 F. Supp. 621, 650-51 (E. D. Va. 1971). And see *Humphrey v. Cady*, 405 U. S. 504, 516-17 n. 18 (1972) (on the authority of *Wilwording*, "some or all of petitioner's claims [attacking his commitment to a "sex-deviate facility"] may be entitled to be treated as claims for relief under the Civil Rights Act, 42 U. S. C. § 1983, in which case no exhaustion is required.") Even two of the Court of Appeals judges who disagreed with the ruling below considered that exhaustion of state remedies was unnecessary for a *damages claim* for wrongful solitary confinement in New York, since that state affords no damages remedy. *Ray v. Oswald*, ____ F. 2d ____, No. 72-1455 (Oct. 19, 1972) (Friendly and Lumbard, JJ.), ("in the absence of an adequate state administrative or judicial remedy, a federal court must hear a suit by a prisoner under section 1983"); *Jones v. Decker*, 436 F. 2d 954 (5th Cir. 1970) (a prisoner's suit for a declaratory judgment and damages relating to solitary confinement requires no exhaustion, though release from solitary does). Some of the dissenters below would also except "shocking" or "on going physical brutality" cases from exhaustion (App. 33a, 126a). The State however, would quite logically bar a federal damages action under § 1983 until *after* resort to the state courts on the merits of the claim (Br. 40).

Moreover, a host of cases in this Court and elsewhere have permitted prisoners to challenge the conditions of their custody under § 1983 without exhaustion of state rem-

edies, without discussing the habeas—§ 1983 classification problem. *E.g., Houghton v. Shafer*, 391 U. S. 639 (1968) (no exhaustion of administrative remedies and explicitly held that no exhaustion of *any* kind is required); *Haines v. Kerner*, 404 U. S. 249 (1972); *Cruz v. Beto*, 405 U. S. 319 (1972); *Younger v. Gilmore*, 404 U. S. 15 (1971); *Cruz v. Hauck*, 405 U. S. 59 (1971); *McDonald v. Board of Elections*, 394 U. S. 802 (1969); *Lee v. Washington*, 390 U. S. 333 (1968); *Cooper v. Pate*, 378 U. S. 546 (1964). This holds true even where release of some kind at some time is involved. See, *e.g., U. S. ex rel. Mosher v. McMann*, 460 F. 2d 126, 132 (2d Cir. 1972) (claim for loss of 616 days good time); *Carothers v. Follette*, 314 F. Supp. 1014 (S. D. N. Y. 1970); *Medlock v. Burke*, 285 F. Supp. 67, 69 (D. Wis. 1968); *cf. U. S. ex rel. Campbell v. Pate*, 401 F. 2d 55, 57 (7th Cir. 1969); *U. S. ex rel. Hancock v. Pate*, 223 F. Supp. 202 (N. D. Ill. 1968); *Nolan v. Scafati*, 430 F. 2d 548 (1st Cir. 1970); *Howard v. Smyth*, 365 F. 2d 428 (4th Cir. 1966); *Landman v. Peyton*, 370 F. 2d 135 (4th Cir. 1966 (release from solitary confinement); *cf. Jones v. Decker, supra.*

On the other hand, many of the cases cited by the State for the proposition that exhaustion is required, involve direct challenges to state *judicial* acts, not to conditions of confinement imposed by state prison officials; exhaustion where there is such direct conflict between federal courts and state courts may well be within the purpose of § 2254 (b). See, *e.g.*, the mental commitment cases, *Strowder v. Shevlin*, 380 F. 2d 370 (3d Cir. 1967), 368 F. 2d 954 (3d Cir. 1966); *U. S. ex rel. Schuster v. Herold*, 410 F. 2d 1071, 1083-89 (2d Cir. 1969) (Kaufman, J.). Only in the parole revocation area, where full release is directly and immediately at issue, have the courts often required exhaustion for claims against administrative actions, though usually without discussion. See *e. g., Morrissey v. Brewer*, 408 U. S.

471 (1972); *Morris v. Wingo*, 421 F. 2d 651 (6th Cir. 1970); *but see Edwards v. Schmidt*, 321 F. Supp. at 70 n. 71 (exhaustion not required for parole revocation). It does not appear, however, that the applicability of § 1983 to parole revocation or even to challenges to other types of state judicial action, has yet been explicitly discussed; since those problems are not involved herein, they need not be resolved at this time.

In sum, the State's claim is contrary to the rationale and history of § 2254(b) and to the overwhelming weight of authority. No case that has explicitly dealt with the issue at bar supports the State's position and there are many decisions to the contrary.

II. An exhaustion requirement will not substantially reduce federal-state friction or the federal court burden, and will not benefit the prisoner.

A. An exhaustion requirement will not reduce federal-state frictions.

The State's argument seems to be that the area of prison administration is unique, that state courts have a special role in relation to prison conditions, and that an exhaustion requirement will reduce federal-state frictions. None of these propositions is supportable.

1. Prison-condition cases do not raise "unique" problems for § 1983 jurisdiction.

In *Wilwording*, this Court stressed that "state prisoners are not held to any stricter standard of exhaustion than any other civil rights plaintiffs. Houghton v. Shafer, 392 U. S. 639." The Court thereby recognized the identity between challenges to prison conditions and challenges to other administrative decisions, and the difference between such

challenges and suits seeking to set aside state court criminal or other judgments on collateral attack. See Kaufman, J., concurring below (App. 120a-21a).

Despite *Wilwording*, the State claims that "the area of prison administration is unique" because of the pervasiveness of correctional officers' control and the "limitless" possibility for federal litigation (Br. 33-34). These very same contentions were presented to this Court in *Houghton v. Shafer, supra*, as arguments for administrative exhaustion: prisons are "unique" and allowing a federal court action will produce "multitudinous" suits. See Supp. Reply to Petition for Certiorari by Attorney General of Pennsylvania in *Houghton v. Shafer*, p. 5. These arguments were summarily rejected there, and should be similarly treated here.

Moreover, the very "uniqueness" claimed by the State cuts against intervention by state courts as much as by federal courts, for insofar as it exists, it results from the enormous discretion vested in the correctional *administrators* (Br. 33-34). It is this *administrative* interest which originally produced the "hands-off" doctrine in state courts, see Note, *Beyond the Ken of the Courts*, 72 Yale L. J. 506 (1962), which the Attorney General of Pennsylvania unsuccessfully argued in *Houghton v. Shafer, supra*, and which the State itself urged in the New York State courts in some of the very cases cited by them as indications of state interest.[5] As a matter of fact, this very type of alleged administrative complexity and "uniqueness' has been stead-

[5] For example, in *Brabson v. Wilkins*, 19 N. Y. 2d 433 (1967), the most recent prison conditions case cited by the State, prison officials urged the New York Court of Appeals to stay out of the prisons area and to maintain a "hands-off doctrine," citing *Childs v. Pegelow*, 321 F. 2d 487 (4th Cir. 1963), one of the leading "hands-off" cases. See Brief for Warden in New York Court of Appeals at p. 10. The same position was taken in other cases cited.

ily urged and uniformly rejected in many other areas of § 1983 jurisdiction besides prison conditions, such as education, see Brief for Respondents in *McNeese v. Board of Education*, 373 U. S. 668 (1968), at pp. 18-20, and housing, *Holmes v. N. Y. City Housing Authority*, 398 F. 2d 262, 266 (2d Cir. 1968).

And the truth is that prisons are not so "unique" that courts cannot exercise a meaningful influence. The handful of federal court decisions that have upheld challenges to prison conditions have already had a powerful and useful impact in improving matters, as enlightened administrators have realized. Maurice Sigler, Chairman of the United States Board of Parole and 1971-72 President of the American Correctional Association recently made exactly this point: "The effect of the courts' new interest in corrections has been beneficial." *A New Partnership in Corrections*, Address before 102nd Congress of the American Correctional Association, p. 5 (Aug. 21, 1972).[6] After all, the

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[6] A fuller excerpt of this portion of Mr. Sigler's address, which also reflects an awareness that prison administration is not unique, is as follows:

"Time is going a lot faster than it used to. I recall in my penitentiary days that nothing much changed from one day to another, from one year to another, or even one decade to another. But we are living in a time of accelerating change, and we in corrections have to take the ball and start running fast just to keep up and maybe pull a little ahead.

"Let me suggest some directions.

"First, we must change our attitudes toward the courts. The courts have not necessarily singled out corrections for attention and interference. In fact, for many years under the 'hands-off' doctrine, the courts left us alone entirely. Perhaps we failed to take advantage of it. What has happened more recently is only a sign of the times. The decisions of the courts are being felt in many facets of American life—in race relations, the environment, taxation, voting apportionment, and so on. It would be unrealistic for us to expect that we would continue to be exempted forever. Corrections is a public function and the attention of the courts is overdue. Frankly, judicial review will be with us from here on out.

(Footnote continued on following page)

federal courts are not trying to "run" the prisons, or any other administrative process. They are merely beginning to insist on certain constitutional minima of decency and fairness which have heretofore been tragically absent from prisons, and which all other relevant agencies have ignored.

(Footnote continued from preceding page)

"In committing offenders to us, the courts have assigned us the responsibility for their care and welfare. All of us have acknowledged that responsibility. It is inconsistent and ill-advised for us to fight every case that comes along involving the rights of our clients. After all, who is supposed to be most concerned about their welfare? Yet we have fought these cases repeatedly, all the way to the Supreme Court of the United States if possible.

"There have been enough cases now that we know the general direction and trend that further cases will follow. In the future, instead of resisting these cases—except perhaps for those which may be too absurd—we ought to anticipate them and take action to make litigation unnecessary.

"So far, we have been able to live with the rulings of the courts. They haven't brought about the disastrous consequences some of us predicted. Instead, the effect of the courts' new interest in corrections has been beneficial.

"For my own part, I must admit that in my day as a line officer I did not question the regulations and the restrictions on mail, visiting, access to the press, the courts, and attorneys. Those of you who have been in corrections for some time know, as I did, that you did not hold on to your job very long if you questioned the policies and orders that were formulated in the front office and handed down from one level of command to another. Or if you held on to your job, you might find yourself buried for years on the morning watch or in a tower. We were trained to do our jobs unquestioningly, and we had no choice.

"Today we are living in a different time. There are few facets of American life that are not undergoing reexamination and criticism. It is time to clear away traditional habits in corrections and take a hard second look at everything that we do. We are being weighed by a tough measure, and we must evaluate our policies and practices by harder and tougher standards of our own." (pp. 4-6) (emphasis added)

2. State courts do not have a special role in prison-condition suits.

For all these reasons, the state courts' interest in prisons is not significantly different from their interest in other § 1983 litigation. The state courts are certainly not more expert than the federal courts in handling constitutional questions; indeed, the opposite is generally true. *England v. La. St. Bd. of Med. Examiners*, 375 U. S. 411, 416-17 (1963); *Zwickler v. Koota*, 389 U. S. 241, 248 (1967). Allowing the state courts an opportunity to participate in developing federal law is certainly a useful goal, but this Court has never considered that a decisive consideration in any § 1983 case. See *England v. La. St. Bd. of Med. Examiners*, 375 U. S. at 416. Nor is the argument that state courts are physically closer than federal courts of constitutional significance—in some cases at least, *e.g.*, Auburn, New York, the federal court is but a few blocks from the prison. In any event, that is clearly a minor detail.

The State's attempt to manufacture a "particular relevance" for the role of the state courts "because the claims arise as a direct consequence of the process of state conviction and sentence" is equally strained. For one thing, the fact that the confinement results from a state court decision does not give that court a special competence or (unhappily) even interest in prison conditions. Most state courts lose jurisdiction over the prisoner shortly after sentence. See *ABA Minimum Standards Relating to Sentencing Alternatives and Procedures* 278 (1967). The long history of the "hands-off" doctrine which still prevails in many state courts indicates a deep and widespread unwillingness to become involved in such matters; the number of cases in which state courts have shown any interest in prison conditions is still almost negligible.[7]

[7] The experience in New York is discussed at pp. 33-35 below.

Moreover, such an argument may cover both too little and too much. The category covered by the "process of state conviction and sentence" is hardly a sharply defined one. Will it include suits for police abuse in the arrest process? *Cf. Monroe v. Pape, supra.* If it refers solely to events *after* conviction and sentence, is it intended to exclude conditions in pre-trial detention facilities, where all that has happened is arraignment, and in some cases, not even that? Will it also include suits for post-release disabilities, after the prisoner has served his sentence—although not a prison-conditions case, this certainly "arise[s] as a direct consequence of the process of state conviction and sentence." Will it include suits for damages for in-prison conditions after an inmate has already been released? In short, what aspect of the criminal process is included or excluded in this "process" involving a "particular relevance" for state courts?

Even those judges who accepted the State's contention below do not go as far as petitioners. Many prisoners file for damages under § 1983. Although the state casually dismisses these as unimportant and not "the real concern of virtually every prisoner action," the fact is that many prisoners do sue for damages. Where the acts complained of are past, or where there is a monetary loss such as the loss of property, *cf. Lynch v. Household Finance Corp.*, 405 U. S. 538 (1972) that is the only remedy. Such damages may also be the most crucial factor in "the removal of the violation" (Br. 39). Injunctions are hard to supervise, and the deterrent effect of a damages action can be very great indeed. For this and other reasons, it has been found that many prisoners do in fact sue for damages.

In many states, however, including New York, prisoners have no damages remedy. See, *e.g., O'Brien v. McGinnis*, 311 N. Y. S. 2d 553 (S. Ct. Alb. 1970); *Hewson v. State of*

York, 27 A. D. 2d 358 (4th Dept.) *appeal dismissed*, 20 N. Y. 2d 758 (1967); Note, *The Collateral Consequences Of A Criminal Conviction*, 23 Vand. L. Rev. 929, 950-51, 1018-28 (1970). Because of this, the authors of two of the opinions deploring the decision below refused to require prior state recourse in damages actions. See *Ray v. Oswald*, *supra*. Yet, the logic of the State's theory, as duly and explicitly set forth in their brief, would require prior recourse to the state courts to determine the merits of the claim, after which the prisoner "may bring a civil rights action in federal court on his state court judgment" (Br. 40). And if the state court denies relief, that would probably bar the claim completely under *res judicata* principles; he would have no right to sue in federal habeas corpus since he would be seeking only damages.

Indeed, injecting the state courts into the process may well *increase* friction between the federal and state courts. As will be more fully explored below in the discussion of the burden on the federal courts, the result of the State's approach will be to produce single-judge federal review of a decision by the highest state court in virtually *every* prison-condition case that a prisoner loses in state court. At present, the review and direct conflict is solely between state administrator and federal court. But under the State's approach, the highest state courts must be brought into the process, and their conclusions of law (and sometimes their findings of fact) will always be reviewed by a federal judge, since *res judicata* does not apply to habeas corpus. Thus, the inter-court conflict that was formerly indirect at most, will become quite direct, and obviously without any compensating reduction of the friction presently resulting from federal judicial review of the prison administrators' action. This particular type of inter-court conflict is precisely the kind that put the severest strain on federal-state relations even with an exhaustion require-

ment. See remarks of Judge Parker, discussed at pp. 13-14 above.

As a recent commentator put it:

". . . [T]here is no sound policy reason for requiring the exhaustion of state judicial remedies. The choice is not between different types of adjudicatory proceedings, one of which may, as in the case of an administrative hearing, provide a more flexible and expert approach to the problem. Nor is it necessary that relief in federal court will disrupt a comprehensive state regulatory scheme. The question is simply whether one court or another is going to decide the case. Certainly the availability of alternative state and federal forums is no novelty to our federal system. There may, of course, be an extra burden imposed on the federal courts if litigants tend to choose the federal forum. But as long as a federal cause of action has been created and appropriate jurisdiction been conferred, it is not for a court to inquire into the burden which Congress has imposed.

"Of course Congress has the power to limit the cause of action or the jurisdiction of the federal court to cases in which an available state remedy has been exhausted. Whether Congress intended so to restrict section 1983 was one of the issues presented in *Monroe v. Pape*. The Court's apparent conclusion that section 1983 was not limited to cases where state judicial remedies had been exhausted is sound, particularly since where Congress has intended such a limitation, its intent has been expressed in clear language." Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 Colum. L. Rev. 1201, 1205-06 (1968) (footnotes omitted).

A Harvard Law Review Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 Harv. L. Rev. 1486 (1969) is critical of § 1983 actions, but would still allow immediate federal jurisdiction of the many prison cases which are proper class actions, 82 Harv. L. Rev. at 1494-96, 1509.[8]

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[8] It is not clear that habeas corpus cases can be brought as class actions. *Cf. Harris v. Nelson*, 394 U. S. 286 (1969); Note, *Multiparty Federal Habeas Corpus*, 81 Harv. L. Rev. 1482 (1968).

1. Exhaustion limited to release or good time cases produces irrational disparities.

The version of the State's argument accepted by the original Court of Appeals panels in *Rodriguez and Katzoff* and apparently by *Amicus* State of California raises even more problems than the broader position advanced here. The argument would require exhaustion where release from custody results from a successful challenge to the prison condition. But that draws lines at purely fortuitous points. If it refers to immediate rather than future release, it would make exhaustion turn on when the action is brought or decided, purely a fortuitous event. If it would reach future release, *i.e.*, all good time cases, it would make exhaustion turn on whether the case involved a challenge to a loss of good time for violating some rule as against an anticipatory, injunctive, declaratory judgment or damages challenge to the operation or enforcement of that same rule, again a fortuitous event. It might encourage prison officials to impose good time penalties even more than they do now, to avoid federal court review. Either version would exempt from the exhaustion requirement all damages actions, as well as all cases brought by prisoners who do not earn good time and therefore cannot lose it, *e.g.*, reformatory-sentenced prisoners in New York, see N. Y. Pen. L. §§ 75.00 and N. Y. Corr. L. §§ 803, 804, as well as challenges to some pre-trial detention facilities even though the very same issues may be involved, as in good time cases.

Indeed, the inconsistencies and incongruities of this more limited position indicate the problem clearly: we deal not with a situation that falls easily into a classification requiring prior state resort, such as a collateral attack on a state conviction but with conditions and official actions that

can arise in a multitude of settings. The essence of the situation is unconstitutional action by administrative officials, with a range of varied consequences and in a variety of settings. Some of these acts affect the length of custody, some lend themselves to damages, some involve challenges to judicial acts (though relatively few), some are appropriate for declaratory relief and some for injunctive relief. The state courts have no greater interest or competence in this area than in any other area of § 1983 jurisdiction; in some of these other areas, they have a more significant connection. See, *e.g., Lynch v. Household Finance Corp.*, 405 U. S. 538 (1972) (garnishment which is usually related to court action, see dissent by White, J.). But even where such state court action is involved, federal court action under § 1983 is not to be displaced. See *Mitchum v. Foster*, 407 U. S. 225 especially 238-43 (1972) (importance of federal tribunals for the protection of civil rights regardless of the existence of state courts with coordinate responsibility). If effective enforcement of the congressional will reflected in § 1983 requires that it be construed as one of the express exceptions to 28 U. S. C. § 2283, even though proceedings are already pending in state courts, surely deference to state courts in § 1983 cases is less appropriate where no such proceedings are pending.[9]

[9] Although the State does not seek it here, the dissenters below urged a form of abstention. But that doctrine is clearly inappropriate, for it deals with a situation where prior recourse to the state courts is for purposes of resolving a question of *state* law which might obviate the federal question, not to give state courts a chance to construe federal law, as petitioners urge here. See, *e.g., Zwickler v. Koota*, 389 U. S. 241, 251 n. 14 (1967); *Lake Carriers Ass'n v. MacMullen*, 406 U. S. 498 (1972).

4. Exhaustion of administrative remedies is precluded by Houghton v. Shafer, supra, and is not raised by the cases at bar.

Exhaustion of administrative remedies was not argued below, nor even presented to the district court; it was explicitly rejected in *Houghton v. Shafer, supra,* when the same arguments were made for it as are made here. See p. 18 above.

In any event, these cases do not raise the issue: Katzoff did exhaust his administrative remedies, and in *Rodriguez* and *Kritsky,* any failure to exhaust state administrative remedies actually resulted from the failure of prison officials to present the matter to the chief administrative officer.

B. The federal courts' burden will not be appreciably lightened by exhaustion.

The State points to the great increase in prisoners' § 1983 petitions and urges that exhaustion will reduce it. But this is a *non sequitur,* for requiring prior recourse will not appreciably lighten the load. The State also condemns these petitions as involving "petty disputes," (Br. 34) which sounded a sympathetic chord with the dissenters and others below. Sadly, however, all too many of these claims do have some merit, as virtually all members of the entire Court of Appeals have recognized from time to time.

1. Exhaustion cannot substantially reduce the federal court case load.

There is no question that the number of prison-conditions cases have risen drastically. There is much dispute, however, as to how heavy a burden this does in fact impose, as Judges Kaufman, Feinberg and Oakes noted below. It has been found, contrary to the fears of both the State and the dissenting judges below, that there have been virtually no

hearings on the *pro se* complaints.[10] Discovery has not been utilized to harass and has, in fact, rarely been used. Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 43 N. Y. U. L. Rev. 159, 170 (1972). Transport of prisoners is almost never done in a *pro se* case, *id.* at 218, and is quite infrequent even in cases involving counsel. When transport has been required, there has been no problem in obtaining state cooperation, despite Judge Mansfield's fears, App. 123a. See Foley, J., in *Wright v. McMann*, 321 F. Supp. 127, 134-35 (N. D. N. Y. 1970), *aff'd in part, rev'd in part*, 460 F.2d 126 (2d Cir. 1972). If prisoners have in fact been filing federal cases in order to get a vacation or "change of scenery" (App. 123a), then they have surely learned by now that this is not a very hopeful gambit.

Furthermore, exhaustion will not lighten the load but merely shift it a bit in time: every state court challenge that is unsuccessful will be followed by a federal court challenge in habeas corpus, unless the prisoner is released, in which case he may sue for damages. And if damages actions are excluded from the exhaustion requirement, as the Court of Appeals below did, see *Ray v. Oswald*, *supra*, exhaustion won't even do that—prisoners will quickly learn to add a damages count, and thereby avoid the exhaustion requirement. On the other hand, if the State's approach to damages is adopted, there will still be a separate federal suit in all successful state challenges.

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[10] Correspondence with United States District Judges John T. Curtin and Edmund Port, of the Western and Northern Districts of New York respectively (the two busiest district courts for prisoners' cases) indicates that in 1971-72, Judge Curtin held "no evidentiary hearings . . . in actions initiated by *pro se* prisoners' applications," and "one evidentiary hearing . . . in each of two cases brought by prisoners who were already represented by retained counsel." Judge Port recalled "that there would not be more than two cases coming within the categories" described above. Letters to counsel from Judges Curtin and Port, both dated Nov. 21, 1972.

That the federal court burden will not be substantially reduced can be seen from the experience with habeas corpus applications. *Despite the exhaustion requirement*, the number rose sharpely during the 1950's and 1960's. See generally Note, *The Burden of Federal Habeas Corpus Petitions from State Prisoners*, 52 Va. L. Rev. 486 (1966); Note, 83 Harv. L. Rev. at 1041-42; Zeigler & Hermann, 43 N. Y. U. L. Rev. at 169-73.[11]

The fact is that the current volume of prisoner petitions results not from the failure to require exhaustion but from the federal courts' occasional willingness to grant relief against gross affronts to human decency. See, *e.g.*, *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967), *on remand*, 460 F.2d 126 (2d Cir. 1972). Despite the occasional and isolated exceptions, state courts are still unwilling to consider these cases on the merits, and it is not for lack of opportunity.[12] See Goldfarb & Singer, 39 Geo. Wash. L. Rev. at 182-84.

2. A significant number of prisoners rights claims are meritorious.

Nor are these cases "petty disputes." As the many decisions throughout the nation and in this Court have shown, a significant number of these cases raise extremely grave

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[11] Prisoners' action under § 1983 are not the only cases to increase dramatically in recent years. There have also been sharp increases in Securities Exchange and Commodities Act case, N. A. R. A. proceedings (narcotics addiction) and federal criminal cases. See Report of the Administrative Office of the United States Courts 108 (1970). Unlike prisoners' cases, these others generally involve full-dress proceedings, and are not disposed of summarily.

[12] It is difficult to see how petitioners can complain about the alleged failure of state prisoners to invoke N. Y. Civ. Rts. L. § 79-c (Br. 30). As petitioners' themselves indicate (Br. 46), state prisoners have turned to the state courts for relief, regardless of whether they knew enough to formally style the case as arising under § 79-c. Their lack of success, no matter what the form of action, is shown at pp. 33-35.

issues, even though most are dismissed summarily. For example, it would seem difficult to argue that Katzoff's complaint about 60 days in solitary and loss of 60 days good time for merely writing some comments in a private uncirculated diary is either "trivial" or "groundless"; the *Rodrigues* and *Kritsky* claims were both sustained on the merits after a full hearing. Many other prison claims have recently been pressed successfully, despite the federal judiciary's frequently expressed reluctance to interfere in the administration of state prisons. The recent tragic events at Attica, the Tombs and elsewhere, where prisoners made demands recognized by all including the administrators as at least reasonable, show the depth of the problem. See Report of New York State Special Commission on Attica 2-102 (1972); *Inmates of Attica v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971); *Sostre v. McGinnis*, 442 F.2d at 190-91, 205. Perhaps some or many of these complaints do not rise to constitutional status for purposes of 42 U. S. C. § 1983, see *e.g.*, *Church v. Hegstrom*, 416 F.2d 449 (2d Cir. 1969), but that can only be decided on a case-by-case basis. See, *e.g.*, *Sostre v. McGinnis*, 442 F.2d at 194 n. 28, 201 ("We leave a more precise delination of the boundaries . . . [re mail] for future cases"); 206 n. 2 (Waterman, J., concurring.[18]

In any event, the very same concern about a plethora of groundless claims was expressed by the dissent in *Monroe v. Pape*, 365 U. S. 167, 240 n. 68 (1961), but all other members of the Supreme Court rejected this argument; they

[18] Judge Hays, one of the dissenters below and the author of the panel opinions in *Katzoff* and *Rodrigues*, would create an exception to the exhaustion requirement for "shocking" and "extreme cases" (App. 32a-33a). Such a category, however, is as likely to defy principled and meaningful definition as the same test in the Fourth Amendment area. See *Rochin v. California*, 343 U. S. 165 (1952).

also implicitly rejected the great concern for localism expressed by the dissent. *Id.* at 243. As was indicated by a judge with much experience in prison cases, the problem may really be one of adequate legal help to filter out the baseless, repetitious, incoherent and generally worthless claims, while leaving the meritorious ones. *U. S. ex rel. Stevenson v. Mancusi*, 325 F. Supp. 1028, 1031 (W. D. N. Y. 1971) (Curtin, J.). See also Zeigler & Hermann, 43 N. Y. U. L. Rev. at 206-07. And as litigation begins to accomplish whatever it is that litigation can do, and as the legal principles are established, the number of filings may well decline as the habeas applications have begun to.

If prisoners do bring frivolous or groundless claims, the proper way to handle these is to dismiss on the merits, as courts are doing today, see Zeigler & Hermann, 43 N. Y. U. L. Rev. at 201, not to close the jurisdictional door completely to meritorious claims. If the burden of such claims is too great, then it is up to the Congress to provide more resources or to restrict the jurisdiction. But that is a legislative, not a judicial matter.

C. The prisoner will not benefit from an exhaustion requirement.

It is hard to take seriously the State's claim that prisoners will be better off by being required to spend several years exhausting state administrative and judicial remedies before being allowed a federal forum in which to avail themselves of the "swift" and "flexible" habeas corpus remedy. Certainly if the State's complaint that state prisoners are not availing themselves sufficiently of available state remedies is at all sound, but see p. 29 n. 11 above, it indicates that prisoners at least think they are better off with a federal forum.

The State's reasons for advising prisoners that they would be better off with habeas corpus than with § 1983, despite having to exhaust all possible state remedies, verge on the ludicrous. Habeas corpus is not as swift as the State claims, see Zeigler & Hermann, *id* at 199-200 (average time for disposition in sample studied was approximately four months) and § 1983 cases can be and are usually handled just as "flexibly." *Id.* at 210-05, 211-16. The fear of a "plenary civil action governed by the full panoply of the Federal Rules of Civil Procedure" (Br. 37) is baseless—as noted above, discovery is rarely utilized except where the action is brought by counsel (and few are), and some of this discovery is probably available in habeas corpus anyway, though generally only after a court order. See *Harris v. Nelson*, 394 U. S. 286 (1969). Moreover, there are many uncertainties about habeas corpus which would have to be resolved—is a class action, often an indispensable aspect of a prison-conditions case, available in habeas corpus? Will it be necessary to bring a separate action for damages? Should the state court's findings be given the same deference as in collateral attacks?

And the prisoner will be still worse off if the state does not permit damages since he will be forced into a multitude of lawsuits almost as a matter of course, even if he wins in the state courts.

All this is to say nothing of the worst aspect of all—the great delay in access to the federal forum when, as the legislative history and hard facts of current history make clear, he is likely to be unsuccessful in state courts. No matter how difficult it is for federal courts openly to acknowledge it, state courts are still not very sympathetic to prisoners' cases. Admittedly, state courts have as great an obligation as the federal tribunals to uphold and apply

the Constitution, but both the Founders of this nation and subsequent Congresses and courts have recognized the special competence and concern of federal courts in this area, and the problems in relying on state courts. For one thing, many state courts are unfamiliar with the problems, especially those in the rural areas in which prisons are located, where there is less federal question business. And as noted, they may be highly unsympathetic. See generally Madison's remarks about the dangers of prior recourse to state tribunals in I Farrand, *The Records of the Federal Convention of 1787* at 124 (1937). See also *The Federalist* No. 80 *passim; The Federalist* No. 81, at 528 (Mod. Lib. ed. 1941); see also the legislative history of the Civil Rights Act in *Monroe v. Pape, supra;* Amsterdam, 113 U. Pa. L. Rev. at 801-02, 835-36 Chevigny, *Section 1983 Jurisdiction: A Reply,* 83 Harv. L. Rev. 1352, 1358-60 (1970).

A glance at state treatment of prisoners' cases demonstrates that regardless of any specific law on the books, such as the 1969 N. Y. Civil Rights Law § 79-c allowing injunctive relief against constitutional violations, state courts continue to adopt a "hands-off" approach. Without seeking them, counsel last year received at least five New York state court orders in cases challenging a wide variety of prison conditions at Auburn prison in 1971. These included one Article 78 proceeding, several "mandamus" claims and a habeas corpus petition, all challenging the denial of good time on various constitutional grounds. The claims included violations of constitutional safeguards in disciplinary proceedings, conditions in segregation, access to law books, denial of medical care, interference with mail, loss of personal and legal property and other claims almost all of which have received at least careful consideration in

federal courts, and some that have been sustained. (Indeed, some complaints relied on the district court opinions in *Sostre v. McGinnis, supra* and in *Wright v. McMann, supra.*)

In each of these five cases, the action was dismissed in virtually identical language, as follows:

> "The respondent [prison superintendent], not the court, is charged with institutional discipline and administration. Furthermore, the petition fails to comply with CPLR 7002 (c) 1."[14] *Cammack v. Fritz,* ____ Misc. 2d ____ (Sup. Ct. Cay. 12/23/70); *People ex rel. George Rudder v. Fritz,* ____ Misc. 2d ____ (Sup. Ct. Cay, Dec. 29, 1970); *People ex rel. Diaz v. Fritz,* ____ Misc. 2d ____ (Sup. Ct. Cay. Dec. 29, 1970); *People ex rel. Cunningham v. Fritz,* ____ Misc. 2d ____ (Sup. Ct. Cay. Dec. 29, 1970).

In a later decision it was put similarly:

> "The withholding of good time for an inmate is a matter concerning the administration and discipline of the Facility, and as such is within the jurisdiction of the respondent [prison superintendent], not the Court." *Jones v. Fritz,* ____ Misc. 2d ____ (Sup. Ct. Cay. 2/9/71).

Even if an appeal were successful, it would take many months, with further appeals by the State inevitable in the unlikely event petitioners might prevail at any point.

Nor is this an isolated attitude. See *People ex rel. Cataliotti v. Lavallee,* ____ Misc. 2d ____ (Sup. Ct. Clin. 1969) (Main, J.); *Bloeth v. Cyrta,* 39 Misc. 2d 1039, 242 N. Y. S. 2d 307 (Sup. Ct. Suff. 1963). Indeed, only a few reported cases show any interest in the problem. Compare *Brabson v. Wilkins,* 19 N. Y. 2d 449 (1971) (4-3) and

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[14] New York CPLR 7002(c)1 requires an affidavit setting forth the name of the custodian and other purely formal matters relating to the detention.

People ex rel. Menechino v. Warden, 27 N. Y. 2d 449 (1971) with *e.g.*, *Catanzaro v. Martin*, 238 A. D. 914, 130 N. Y. S. 2d 200 (4th Cir. 1954) and *People ex rel. Scarola v. Jackson*, 276 A. D. 939, 94 N. Y. S. 2d 251 (3d Dept. 1950). One area in which state courts have shown some interest recently is in religious practices, and even there, the rulings are inconclusive, *Blazic v. Fay*, 21 A. D. 2d 817 (2d Dept. 1964); *Casey v. Fay*, 22 A. D. 2d 941 (2d Dept. 1964).

These decisions illustrate the scope of the problem. And there are probably many more like them throughout the United States unknown to counsel, since such decisions are rarely reported. As the Founding Fathers, subsequent Congresses and Supreme Court decisions all recognize, state remedies are simply inadequate where controversial federal rights are concerned. To force prisoners to resort to them is thus effectively to deny them their day in court—*any* court.

There are of course isolated examples to the contrary. But they are still all too rare.

In view of these facts of life, to require exhaustion is to run the risk that because of the time lag, prisoners may lose the federal forum entirely. This is not because the state courts do not act expeditiously (Br. 43-44), but because of the need to go through the entire hierarchy of state administrative and judicial proceedings, including all appeals.

The State contends that the logical implication of respondents' position is that exhaustion would not be required even for collateral attack if the sentence is short enough (Br. 45). Perhaps, and that is some authority for that position. *Ex Parte Kieffer*, 40 Fed. 399 (C. C. D. Kan. 1889) (petty offense); *U. S. ex rel. DeVita v. McCorkle*, 216 F. 2d 734, 744 (3d Cir. 1954); *Thomas v. Teets*,

205 F. 2d 236, 240 (9th Cir.) *cert. denied*, 346 U. S. 910 (1953) (death penalty); Note, 83 Harv. L. Rev. at 1100; Amsterdam, 113 U. Pa. L. Rev. at 893-94. But collateral attack on a state court judgment raises such different considerations, that one may continue to require exhaustion even in cases where the sentences are very short, while avoiding loss of a federal forum where those considerations are not present.

The State also seems to complain that the state prisoner is presently better off than the federal prisoner who, according to the State, is restricted to habeas corpus. It is now clear, however, that federal prisoners have remedies other than habeas, such as mandamus, 28 U. S. C. § 1651, and the like. See *Mead v. Parker*, 464 F. 2d 1108 (9th Cir. 1972). Also, habeas corpus for federal prisoners does not involve postponing and perhaps losing a federal forum for a federal claim. Administrative exhaustion is indeed required, but that is because the special reasons for refusing to require administrative exhaustion in § 1983 do not apply; in any event, it is not the habeas remedy that requires the administrative exhaustion, but other considerations that are not present in the state situation and apply even where a federal prisoner does not use the habeas route.

The fact is that the State wants to make state prisoners who challenge prison conditions much worse off than either federal prisoners, other § 1983 claimants, or those who attack their convictions: only those who attack in-prison conditions will be required to exhaust not merely state judicial remedies, like other state habeas petitions, but also state administrative remedies. No other class is so disadvantaged yet few others are more in need of protection.

As noted above at p. 30 n. 13 some of the dissenters would dispense with exhaustion where truly "shocking" conditions are concerned. See App. 33a. But how can the prisoner know what a judge will find "shocking"? If he thinks those "shocking" conditions exist — and he usually will — he will routinely file in federal court. If he is wrong, he will then have to go into state court and then later back to federal court.[18]

Conclusion

For almost a century and a half, our prisons have been a national disgrace. Waves of prison reform have come and gone, but to no avail. The Chief Justice has described prison systems as "the most neglected, the most crucial and probably the least understood phase of the administration of justice," wherein inmates are treated like "rubbish." Address by Chief Justice Burger, Centennial Convention of the Ass'n of the Bar of the City of New York, Feb. 17, 1970, in 25 Record of N. Y. C. B. A. 14, 15 (Supp. March 1970). President Nixon has recently decried the "appalling deficiencies of our prisons and rehabilitation efforts" and stated that the prison system "presents a convincing case of failure." Memorandum from the President of the United States to the Attorney General of the United States, Nov. 13, 1969, quoted in Singer, *Bringing the Constitution to Prison: Substantive Due Process and the Eighth Amendment*, 39 U. Cin. L. Rev. 650, 651 (1970). See also Burger, *No Man Is an Island*, 56 A. B. A. J. 325 (1970).

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[18] An example of how long it can take state courts to handle a problem after a federal court ordered abstention in 1964, *Sostre v. McGinnis*, 334 F. 2d 906 (2d Cir. 1964), can be found in *SaMarion v. McGinnis*, 35 A. D. 2d 684, 314 N. Y. S. 2d 715 (4th Dept. 1970).

Only recently, have hopes begun to stir. Part of the reason has been the actions of the federal courts, and, as noted, enlightened administrators have not rejected such action. See Sigler, *supra*. And some changes have resulted.

Those changes are what is really at stake in this proceeding. The State is not arguing on behalf of the state courts' prior scrutiny but really against any meaningful scrutiny at all. Their arguments in other cases, the lack of any real change in *e.g.*, New York, except occasionally in response to court suits, all demonstrate this. Respondents do not wish to denigrate the state courts, but the framers of the Civil Rights Act knew very well that it is the *federal* judiciary that is our primary protector against arbitrary and unconstitutional state action. See *Mitchum v. Foster*, *supra*. The federal judge's detachment, life tenure, and familiarity with constitutional questions, all conjoin to make meaningful protection a real possibility. Regardless of isolated exceptions, prisoners and petitioners know that what is at stake is not merely the possibility of federal judicial review but the possibility of any meaningful judicial review whatsoever.

Obviously, there are difficulties and frictions; at times there will be problems with classifications though the line drawn by Judges Kaufman and Doyle limiting the exhaustion requirement to collateral attacks on convictions, would seem to be clear and sharp. But a society faced with so troubled an institution as our prisons, will never be able to deal with it without some frictions and difficulties.

If our prisons are to be restored to decency, the federal courts must be allowed to continue the role they have begun to play. The alternative would announce to the world, to the prisoners, and to the administrators, that state

prisoners are not entitled to the Constitution. Such an announcement may not only halt the impetus for improvement but may actually reverse the process.

In *Humphrey v. Cady*, and in *Wilwording v. Swenson*, this Court declared that "state prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." 404 U. S. at 251-252. The State would have this Court repudiate that position, despite the absence of either precedent or sound policy.

The decision below should be affirmed.

Respectfully submitted,

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INDEX

	Page
TABLE OF CASES AND OTHER CITATIONS	ii
INTEREST OF AMICUS	1
THE QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	6
I. Because the civil rights act is supplemental to state remedies, this Court has never required any citizen—prisoner or non-prisoner—to exhaust state remedies	6
A. The legislative history of §1983, and other federal jurisdictional statements make clear the desire of Congress that federal courts protect federal rights	7
B. Since prisoners suing under §1983 cannot be distinguished from other citizens seeking similar redress, a requirement of exhaustion in this case would necessitate uniform applicaton to other citizens . . .	12
C. State-federal comity does not require exhaustion; indeed, such a requirement might exacerbate that relationship	15
D. The burden of determining whether exhaustion is to be required in cases of this kind should be with Congress, not with this Court	19

Page

II. Prisoners' rights suits under §1983, generated during the 1960's by important changes in federal law and inmate status, are now levelling off and present no greater burden on federal courts than other federal complaints 22

A. Increasing prisoner unrest, the inherent limitations of federal *habeas corpus*, and the impact of *Monroe v. Pape* and subsequent rulings, have resulted in a temporary increase in suits filed by prisoners under §1983 24

B. Prisoner petitions filed under §1983 and increasing at a slower rate and involve proportionately less trials than most other civil suits 28

C. Development of alternative mechanisms for the resolution of potential prisoner court claims promises to reinforce the recent stabilization of prisoner petitions, and reduce the federal caseload in this area 33

CONCLUSION 36

CASES CITED

Abele et al. v. Markel,
Civ. NO. 14291 (D. Conn. 1971) 16

Abernathy v. Cunningham,
393 F. 2d 201 (5th Cir. 1963) 26

Bailey v. Patterson,
323 F. 2d 201 (5th Cir. 1963) 13

Bowe v. Colgate Palmolive Company,
416 F. 2d 711 (7th Cir. 1969) 13

Page

Burford v. Sun Oil Company,
319 U.S. 315 (1943) 15

Brown v. Peyton,
437 F. 2d 1228 (4th Cir. 1971) 33

Carafas v. LaVallee,
391 U.S. 234 (1968) 18, 26

City Bank v. Schnader,
291 U.S. 24 (1934) 6

Cooper v. Pate,
378 U.S. 546 (1964) 28

Daniels v. Allen,
344 U.S. 443 (1953) 10

Damico v. California,
389 U.S. 416 (1967) 6

Dunn v. Blumstein,
405 U.S. 330 (1972) 13, 16

Earnest v. Willingham,
406 F. 2d 861 (10th Cir. 1969) 33

Edwards v. Schmidt,
321 F. Supp. 68 (W.D.Wisc. 1971) 27

England v. Louisiana State Board of Medical Examiners,
375 U.S. 411 (1964) 15

Ex Parte Royal,
117 U.S. 241 (1886) 26

Fay v. Noia,
372 U.S. 391 (1963) 10, 18, 20, 26

Feibleman v. Packard,
109 U.S. 421 (1883) 9

Page

Fulwood v. Clemmer,
206 F. Supp. 370 (D.D.C. 1962) 26

Furman v. Georgia,
408 U.S. 238 (1972) 31

Gilmore v. Lynch,
319 F. Supp. 105 (N.D.Cal. 1970), aff'd *sub. nom.*
Younger v. Gilmore, 404 U.S. 15 (1971) 33

Goldberg v. Kelly,
397 U.S. 254 (1970) 13

Gray v. Creamer,
465 F. 2d 179 (3rd Cir. 1971) 33

Gully v. First National Bank in Madison,
299 U.S. 109 (1936) 9

Hahn v. Burke,
430 F. 2d 100 (7th Cir. 1970) 33

Hall v. Wethan Bag Corporation,
251 F. Supp. 184 (D.Tenn. 1966) 13

Harman v. Forssenius,
380 U.S. 528 (1965) 16

Houghton v. Schafer,
392 U.S. 639 (1968) 7

Howard v. Smith,
365 F. 2d 428 (4th Cir. 1966) 26

Jackson v. Godwin,
400 F. 2d 529 (5th Cir. (1971) 33

Johnson v. Avery,
393 U.S. 483 (1969) 33

Johnson v. Zerbst,
304 U.S. 458 (1938) 10

Page

Jones v. Cunningham,
371 U.S. 236 (1963) 18, 26

Jones v. Metzger,
456 F. 2d 854 (6th Cir. 1972) 33

Jordan v. Fitzharris,
257 F. Supp. 674 (N.D.Cal. 1966) 32

Kritsky and United Stetes ex rel.'
Kritsky v. McGinnis,
313 F. Supp. 1247 (N.D.N.Y. 1970) 2

LaFleur v. Cleveland Board of Education,
465 F. 2d 1184 (6th Cir. 1972) 13

Lane v. Wilson,
307 U.S. 268 (1939) 6

McNeese v. Board of Education,
373 U.S. 668 (1963) 5, 6, 10, 13

Mitchum v. Foster,
407 U.S. 225 (1972) 18

Monroe v. Pape,
365 U.S. 167 (1961) 6, 13, 27

Moore v. Ciccone,
459 F. 2d 574 (8th Cir. 1972) 33

Nolan v. Fitzpatrick,
451 F. 2d 545 (1st Cir. 1972) 32

Novak v. Beto,
453 F. 2d 661 (5th Cir. 1971) 35

Peyton v. Rowe,
391 U.S. 54 (1968) 18, 26

Railroad Commission v. Pullman Company,
312 U.S. 496 (1941) 15, 16

Page

Reetz v. Bozanich,
397 U.S. 82 (1970) 16

Robinson v. California,
370 U.S. 660 (1962) 28

Rodriguez and United States ex rel. Rodriguez v. McGinnis,
456 F. 2d 79 (2nd Cir. 1972) (*en banc*) 3, 22

Rodriguez and United States ex rel. Rodriguez v. McGinnis,
451 F. 2d 730 (2nd Cir. 1971) 2, 3

Rodriguez and United States ex rel. Rodriguez v. McGinnis,
307 F. Supp. 627 (N.D.N.Y. 1969) 2

Smith v. Kansas City Title and Trust Company,
255 U.S. 180 (1921) 9

Stapleton v. Mitchell,
60 F. Supp. 51 (1945) 10, 11

Textile Workers Union v. Lincoln Mills,
353 U.S. 448 (1957) 10

Townsend v. Sain,
372 U.S. 293 (1963) 26

United States ex rel. Katzoff v. McGinnis,
441 F. 2d 558 (2nd Cir. 1971) 2, 3

Wilwording v. Swenson,
404 U.S. 249 (1971) 5, 7

Wright v. McMann,
387 F. 2d 519 (2nd Cir. 1967) 27

Younger v. Harris,
401 U.S. 37 (1971) 17

Page

Zwickler v. Koota,
389 U.S. 241 (1967) 16

LAW REVIEW ARTICLES, REPORTS, MISCELLANEOUS

ABA Project on Minimum Standards of Criminal Justice, Standards Relating to Post Conviction Remedies (1968) 14, 15, 34

American Law Institute, Study of the Division of Jurisdiction between State and Federal Courts (1969) 10, 11, 15

Annual Report of the Director, Administrative Office of United States Courts (1972) . . . 23, 28, 29, 30, 31, 32

Chadbourn and Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639 (1942) 8

Chevigny, Comment, 83 Harv. L. Rev. 1352 (1970) . . . 11, 19, 31

Cohen, The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law, 115 U. Pa. L. Rev. 840 (1967) 9

Congressional Globe, 42nd Congress, 1st Session 567 (1871) 7, 8

Counsel on Legal Education for Professional Responsibility Newsletter, Volume IV, No. 13 (May, 1972). 34

Forrester, The Nature of a Federal Question, 16 TW. L. Rev. 363 (1942) 8

Friendly, In Praise of Erie and the New Common Law, 39 N.Y.U.L.Rev. 383 (1964) 9

Goldfarb and Singer, Redressing Prisoner Grievances, 39 G.W.L.Rev. 175 (1970) 33

Page

Graham, The Federal Courts and Exhaustion of State Remedies, 36 Conn. B. J. 60 (1962) 6

Jacob and Sharma. Justice After Trial: Prisoner Need for Legal Services in the Criminal Correctional Process, 18 Kan. L. Rev. 493 (1970) 33

Keve, Paul, Letter to the President's Commission on the Causes and Prevention of Violence, October 9, 1968 24-25

Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157 (1953) 9

National Council on Crime and Delinquency, A Model Act for the Protection of Prisoners (1972) 33

Nixon, Richard M., Address to the National Conference On the Judiciary, March 11, 1971 . . . 25

Schoenfeld, American Federalism and the Abstention Doctrines in the Supreme Court, 73 Duke L. Rev. 605 (1969) 15

United States Department of Justice, Perspectives on Prison Legal Services: Needs, Impacts, and the Potential for Law School Involvement (1972) 34

COMMENTS AND NOTES

68 Colum. L. Rev. 1201 (1968) 17, 21

73 Harv. L. Rev. 1358 (1960) 15

82 Harv. L. Rev. 1486 (1969) 14, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LAVALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KITZOFF and JOHN KRITSKY,

Respondents.

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS

The American Bar Association is a national organization of the legal profession. It has more than 155,000 members from all states and has for some years maintained an active interest in criminal justice improvement. One of its recent and more ambitious undertakings in this area has been the Project on Minimum Standards for Criminal Justice, elements of which (as referred to in our argument) are pertinent to issues before the Court in this case.

In 1970, the American Bar Association established an interdisciplinary Commission on Correctional Facilities and Services to address its growing interest in and commitment to the correctional phase of criminal justice administration. The Commission has undertaken a program to stimulate broadscale improvement in all aspects, legal and operational, of the nation's systems for correction and rehabilitation of criminal offenders. Among the Commission's several action projects is a Resource Center for Correctional Law and Legal Services concerned with resolution of the growing number of legal and constitutional issues being raised in connection with the operation of correctional programs and systems. Focusing on the demands of both law and sound correctional practice, the Commission is anxious to contribute to full consideration of legal questions which bear so significantly on the effectiveness and fairness of our correctional apparatus.

As the Association's major instrumentality for correctional reform, the Commission has a special interest in the issues being litigated in this case, which relate directly to the future role of our judicial systems in protecting and enforcing the federal and constitutional rights of those under correctional restraint.

It is the belief of the American Bar Association that this brief will provide a significant contribution to the resolution of the issues now before this Court.*

QUESTION PRESENTED

Must a state prisoner, unlike any other citizen of the United States, first exhaust all possible state judicial remedies before seeking in federal court the protection of the Civil Rights Act, 42 U.S.C. §1983, to vindicate rights guaranteed by the United States Constitution?

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* Copies of the letters from attorneys for both parties agreeing to the ruling of this amicus brief have been filed with the clerk of this Court.

STATEMENT OF THE CASE

Respondents, Rodriguez, Kritsky and Katzoff, were incarcerated in different penal institutions of the State of New York at the time of filing their *pro se* complaints in the District Court for the Northern District of New York, alleging unconstitutional deprivation of good behavior time credits under both the Federal *Habeas Corpus* Statute, 28 U.S.C. §2241 *et seq.*, and the Civil Rights Act, 42 U.S.C. §1983. All three *pro se* complaints received favorable disposition in the district court, the disputed good time credits being ordered restored. *Rodriguez and United States ex rel Rodriguez v. McGinnis*, 307 F. Supp. 627 (N.D.N.Y. 1969); *Kritsky and United States ex rel Kritsky v. McGinnis*, 313 F. Supp. 1247 (N.D.N.Y. 1970). The *Katzoff* opinion was not officially reported.

Divided panels of the Second Circuit reversed the decisions of the lower court in the cases of *Rodriguez* and *Katzoff* and held, among other things, that Respondents had failed to exhaust their state court remedies as required by 28 U.S.C. §2254(b) and (c). *Rodriguez and United States ex rel Rodriguez v. McGinnis*, 441 F. 2d 558 (2nd Cir. 1971); *United States ex rel Katzoff v. McGinnis*, 441 F. 2d 558 (1971). The *Rodriguez* panel also found that compliance by state corrections officials with §236 of the New York Correction Law* was not constitutionally

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*New York Correction Law §236:

"In all cases . . . where the [prison commutation] board shall withhold the allowance of the whole or any part of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, they shall forward with their report to the commissioner of correction their reasons in writing, for such disallowance. The action of the board in granting or withholding reductions shall be deemed a judicial function and shall not be reviewable if done according to law."

required, and that Rodriguez did not lose good time credits solely as a result of his refusal to inform corrections officials of the source of contraband correspondence found in his possession.

The *Katzoff* panel, in holding that exhaustion was required, found that available state remedies were adequate regardless of the proximity of Katzoff's release date. Petitions for rehearing in *Rodriguez* and *Katzoff* were denied on July 19, 1971.

The *Kritsky* case, *supra*, reached argument before yet another panel of the Second Circuit, but prior to reaching decision, all three cases, *Kritsky*, *Rodriguez* and *Katzoff*, were ordered consolidated for *in banc* consideration by the Second Circuit Court of Appeals. On January 25, 1972, the *in banc* court issued a 9-3 order affirming the judgments of the District Court, *Rodriguez and United States ex rel Rodriguez v. McGinnis*, 456 F. 2d 79 (2nd Cir. 1972) (*in banc*), based primarily upon authority of *Wilwording v. Swenson*, 404 U.S. 249 (1971).

A petition for *certiorari* was filed on April 24, 1972, and *certiorari* was granted on June 19, 1972.

SUMMARY OF THE ARGUMENT

At least since the Civil War, if not earlier, both Congress and this Court have consistently stressed that the proper forum for the resolution of federal constitutional complaints is federal court. The history of the Civil Rights Act of 1871, 42 U.S.C. §1983, is replete with evidence that the Act was passed specifically to allow federal jurisdiction over federal constitutional claims without the requirement that plaintiffs first exhaust their state judicial

remedies. This Court has recognized the verity of that view in numerous cases, both in non-prisoner (*McNeese v. Board of Education*, 373 U.S. 688 (1963)) and prisoner (*Wilwording v. Swenson*, 404 U.S. 249 (1971)) cases. Any contraction of this rule, in addition to effectively rewriting the legislation, would cause innumerable practical and theoretical difficulties, since there is no logical stopping point between prisoner §1983 suits and all other §1983 suits or, in fact, between §1983 suits and all other suits brought to redeem constitutional rights. To require exhaustion here might inevitably lead to a requirement of exhaustion in every case in which a constitutional issue is raised; the precept that federal courts stand ready to defend federal rights would be severely diluted.

Arguments that the federal courts are overloaded with prisoner §1983 actions are factually erroneous. A hard look at data compiled by the Administrative Office of the United States Courts demonstrates that (1) prisoner civil rights suits have increased less than many other types of civil action over the last few years; (2) there is firm reason to believe that they will decrease in absolute terms in the next few years; (3) that essentially no trial time is occupied with the vast majority of prisoner civil rights suits. Moreover, judicial action to restrict jurisdiction at this point might be precipitous. Other systems of delivery of legal services, such as the use of law students, paraprofessionals, ombudsmen, grievance mechanisms inside our penal institutions, and others, are now being employed in an effort to both improve the quality of prisoner legal aid and reduce the number of frivolous complaints filed in §1983 actions. These methods, supported by correctional administrators and high officials at all levels of government, are more productive, as well as less discriminatory, ways of seeking to reduce prisoner suits, and should at least be given an opportunity to work before federal jurisdiction is cut off by a narrowing interpretation of the Civil Rights Act.

ARGUMENT

I. BECAUSE THE CIVIL RIGHTS ACT IS SUPPLEMENTAL TO STATE REMEDIES, THIS COURT HAS NEVER REQUIRED ANY CITIZEN–PRISONER OR NON-PRISONER–TO EXHAUST STATE REMEDIES

Ever since this Court's opinion in *Monroe v. Pape*, 365 U.S. 167 (1961), resuscitating the Civil Rights Act, both this Court and others have stressed that the remedy of §1983 is supplemental to other existing remedies, whether state or federal. Thus, in *Monroe*, this Court declared:

> The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in federal court.
>
> 365 U.S. at 183

This was not a new doctrine. Much earlier, this Court had held that federal plaintiffs need not seek a state remedy before filing in federal court, whether in a diversity case, *City Bank v. Schnader*, 291 U.S. 24 (1934), or in a case based specifically on §1983, *Lane v. Wilson*, 307 U.S. 268 (1939). One writer, commenting on *Monroe*, asserted that historically the rule had been that "If the remedy is one which is traditionally judicial and that matter is one which is cognizable by both state and federal courts, a plaintiff is under no obligation to seek redress in the state courts and may proceed immediately in the federal court." Graham, The Federal Courts and Exhaustion of State Remedies, 36 Conn. B.J. 60, 65 (1962). This view has been consistently repeated since that time. *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Damico v. California*, 389 U.S. 416

(1967). This Court has specifically ruled so in regard to prisoner suits on several occasions, the last time in the past term of this Court. *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Houghton v. Schafer*, 392 U.S. 639 (1968). The question now is whether these precedents—and the policies behind them—are to be overruled.

A. The Legislative History of §1983, and Other Federal Jurisdictional Statements Make Clear the Desire of Congress that Federal Courts Protect Federal Rights

The Court's past position that §1983 never requires exhaustion is consonant with the history of that act. Congressional debate demonstrates that the statute was passed primarily, but not exclusively, to allow blacks the right to seek federal protection from federal courts for effectuation of federal rights, without the necessity of going through a state system. For example, Senator Edmunds, a Senate manager for the bill, specifically declared:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.
>
> Cong. Globe, 42nd Cong. 1st Session 567 (1871)
> See also *id.*, at 334, 505-506

Similarly, the House Sponsor of the bill, Representative Shellabarger, said:

> [Section 1983] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.
>
> *Id.*, App. 68

Although these legislators quite likely held the view that the state court systems might be inherently biased against claims brought by blacks, two factors militate against any conclusion that this was the sole force behind the legislation. First, as the foregoing remarks of two sponsors of the bill demonstrate, the legislation was not expressly restricted to blacks, but opened the door to the federal courts to any person or group which believed itself to suffer from some discrimination in violation of the Constitution. Second, the belief was emerging in Congress that federal rights *should* be protected by federal courts. Although this states a principle now long accepted in our jurisprudence, the concept was not well accepted then. Only four years after passage of the Civil Rights Act, Congress specifically acted to ensure that federal rights of all kinds, not otherwise covered by prior legislation, would indeed receive the protection afforded by federal courts. In 1875, Congress extended federal court jurisdiction to *all* cases involving federal questions. Act of March 3, 1875, §1, 18 stat. 470. See Forrester, The Nature of a Federal Question, 16 Tul. L. Rev. 363 (1942); Chadbourn and Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639 (1942).

Prior to 1875, federal courts in this country were, in many ways, simply appellate courts for decisions rendered by state courts. This system had two major defects: (a) it made the federal courts virtually impotent to protect federal rights; (b) when a federal court did protect federal rights, it was only when it overruled an earlier decision by a state court, thus increasing state-federal tension. For these reasons, Congress in 1875 enacted the predecessor of 28 U.S.C. §1331, granting original federal jurisdiction in cases involving "federal questions".

It seems clear that the same motivation which impelled Congress in 1875 to cover all federal rights with a blanket statute (28 U.S.C. §1331) informed the passage, in 1871, of the Civil Rights Act, geared to protect specific federal rights stemming from the Constitution (42 U.S.C. §1983). At the time the Civil Rights Act was passed, most citizens were required to go to state court to enforce their federal rights. The Civil Rights Act changed that situation and enabled citizens to seek relief directly from the federal courts. In the absence of general "federal question" jurisdiction of the courts at that time and in view of what later followed in 1875, Congressional intent of non-exhaustion with respect to constitutionally-protected rights seems all the more evident.

Much has gone into determining what is a "federal question" in the century since §1331 was passed[1], but the position of this Court, both in cases raising that precise issue and those involving other questions of state-federal

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[1] See e.g., *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936); *Feibleman v. Packard*, 109 U.S. 421 (1883); *Smith v. Kansas City Title and Trust Company*; 255 U.S. 180 (1921). See also Cohen, The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law, 115 U. Pa. L. Rev. 840 (1967); Friendly, In Praise of Erie and the New Federal Common Law, 39 N.Y.U. L. Rev. 383 (1964); Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157 (1953).

relations, has been firm—federal courts are to protect federal rights. A long line of cases, from *Johnson v. Zerbst*, 304 U.S. 458 (1938) to *Daniels v. Allen*, 344 U.S. 443 (1953), to *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) to *Fay v. Noia*, 372 U.S. 391 (1963) has reiterated this theme.

The wisdom of this approach has been demonstrated repeatedly in the years since that decision. A notable instance is the school desegregation cases, in which the federal courts sought to shield black citizens from discrimination from all governmental bodies, state and federal. In supporting general federal jurisdiction over federal rights questions, the American Law Institute, in a comprehensive study of state/federal judicial relationships, focused on this point:

> Recent litigation involving civil rights has dramatized the need for an independent system of federal courts to vindicate federal rights.
>
> ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 163 (1969)

The rationale is sound, both on a theoretical and a practical basis. Federal courts should protect federal, constitutional rights; that is their prime *raison d'etre*. As this Court said in *McNeese v. Board of Education*, 373 U.S. 668, 672 (1963):

> We would defeat [the] purposes [of section 1983] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court.

The *McNeese* Court then quoted the stirring words of Judge Alfred J. Murrah in *Stapleton v. Mitchell*, 60 F. Supp. 51 (1945):

> We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.
>
> *Id.* at 55
> (FN. 6)

Several writers, including the Reporter of the American Law Institute Study, have suggested another reason for a "non-exhaustion" rule:

> Federal district court judges . . . deal primarily with federal law flowing from the Supreme Court and circuit courts of appeal. The precedents which bind them and the superiors who guide them all focus on federally derived rights and duties. They are, therefore, more likely to be well versed in the interrelationship of federal due process, equal protection, and Bill of Rights rulings of recent years. A plaintiff whose federal claim is in any way novel may expect, then, a more educated analysis from federal courts than from state remedial tribunals . . . We are, after all, talking about cases involving federally derived rights . . . and these rights by definition should not vary with geography.
>
> Chevigny, Comment, 83 Harv.
> L. Rev. 1352, 1357 (1970)

Similarly, the ALI study found, "There is reason . . . to believe that greater uniformity results from hearing these cases in a federal court. Erroneous application of federal law may result from a misunderstanding as to the law or from a lack of sympathy to it . . . it is difficult to avoid

concluding that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts". *Id.*, at 165-166.

In short, any citizen of a state is a citizen of the United States; when his rights stem from being a United States citizen and from the U.S. Constitution, he should be able to seek redress in a U.S. Court. Federal courts for the protection of federal rights is sound doctrine.

B. Since Prisoners Suing Under §1983 Cannot Be Distinguished From Other Citizens Seeking Similar Redress, A Requirement of Exhaustion in This Case Would Necessitate Uniform Application to Other Citizens

If this Court finds that prisoners must exhaust their state judicial remedies, then, as the current doctrine stands, prisoners will be the only Americans required to do so. Such a stance, however contemplated, would add to the discrimination which prisoners already face as "convicts"; their "second-class citizenship" would be reenforced. If we wish our correctional institutions to really "correct", any acts or policies which confirm to the inmate that he is not able to exercise his rights in the same manner as other citizens, would seem to run counter to that hope and aim. The goal for reformation of our prisons, and of reformation for the prisoner, would tend to become another promise "spoken to the ear, broken to the heart".

It is difficult to see where, if this Court were to accept the State's argument and require prisoners to exhaust their remedies under §1983, the logical stopping point of the holding would be, short of an extensive revision of federal question jursdiction and the general federal relationships which permeate the court system in this country. If prisoners must exhaust their remedies under

§1983, there seems no legitimate way to distinguish them from many other groups of citizens whose grievances with state government may be equally serious. Thus, the Court would be impelled, without the fresh legislative mandate so critical to changes of this magnitude, toward a position requiring exhaustion of state judicial remedies by all citizens before seeking relief in federal courts.

As this Court is aware, §1983, particularly since *Monroe*, has served as the basis for jurisdiction in a multitude of suits. Suits have been brought under §1983 to challenge (1) discrimination in employment, *Hall v. Wethan Bag Corporation*, 251 F. Supp. 184 (D.Tenn. 1966), in education, *McNeese v. Board of Education*, 373 U.S. 668 (1963) and in the use of public facilities, *Bailey v. Patterson*, 323 F. 2d 201 (5th Cir. 1963); (2) complaints of sexual discrimination, *Bowe v. Colgate Palmolive Company*, 416 F. 2d 711 (7th Cir. 1969); *LaFleur v. Cleveland Board of Education*, 465 F. 2d 1184 (6th Cir. 1972), noted 40 U. Cin. L. Rev. 857 (1971); (3) voter disenfranchisement, *Dunn v. Blumstein*, 405 U.S. 330 (1972); and (4) termination of welfare rights, *Goldberg v. Kelley*, 397 U.S. 254 (1970). To suggest, now, that these kinds of plaintiffs, and the numerous others who have employed §1983 to protect their constitutional rights, must first exhaust their state remedies would frustrate the one hundred year development of a coherent policy of federal rights. Yet a holding against respondents in this case would undoubtedly cast such a cloud upon the rights of these groups of plaintiffs.

But then the next question would arise: what is the difference between a citizen filing suit under §1983 and one filing suit under other statutes, e.g. 28 U.S.C. §1344, which allow actions against state officers without exhaustion on either a constitutional or federal pre-emption ground? If fear of federal-state tension is a basis for requiring exhaustion in §1983 cases, it is present, too, in

such other cases. Would not exhaustion be required in those cases as well?

It takes little time to recognize that this logical progression could lead to a severe curtailment of current federal jurisdiction. The federal courts would be relegated, in a large number of situations, to a place of subordination, able to deal with federal rights only after state courts had dealt with them. Only in the small handfull of cases where Congress has expressly declared exclusive jurisdiction such as patents, 35 U.S.C.A. §1 *et seq.;* commerce, 15 U.S.C.A. §1 *et seq.;* copyrights, 17 U.S.C.A. §1 *et seq.;* and Indians, 25 U.S.C.A. §1 *et seq.*, would federal courts be approached just with federal issues. We would have returned, in essence, to the pre-Civil War position of the two court system.[2]

Where first resort to the state courts or to other state proceedings has been desirable, the American Bar Association has supported that course. In a lengthy study and formulation of *Standards Relating to Post Conviction Remedies*, its House of Delegates endorsed the concept of exhaustion in *habeas corpus* cases. The first principle enunciated in that report declares that "the unitary remedy should encompass all claims whether factual or legal in nature and should take primacy over any existing procedure or process for determination for such claims." *Id*, at 23. In the first paragraph explaining that provision, however, the Association emphasized that it did not encompass the normal range of actions covered by the Civil Rights Act as within the principle: "other claims, however, unrelated to

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[2] Some critics of the present rule that exhaustion is not required in §1983 cases admitted as much: "If state courts applied the substantively equivalent remedy standards on which the federal court had relied in dismissing, the res judicata effect of the federal court dismissal would mean *plaintiff's §1983 claim was no longer available as such.*" Note, 82 Harv. L. Rev. 1486, 1503 (1969) (Emphasis added).

the validity of conviction, sentence or custody are not considered 'post-conviction' proceedings in this report: e.g., claims by inmates of denial of freedom of religion in jails; claims of physical mistreatment by custodial officials." *Id.*, at 24.[3]

C. State-Federal Comity Does Not Require Exhaustion; Indeed, Such a Requirement Might Exacerbate that Relationship

Only in rare and exceptional instances has this Court suggested that state remedies must first be pursued by those seeking to vindicate their federal rights. Most important of these exceptions, of course, has been the general doctrine of abstention, first enunciated in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). This doctrine, discussed in many articles[4] has been generally applied where there are complex administrative issues to be resolved by administrative agencies of the executive branch, *Burford v. Sun Oil Company*, 319 U.S. 315 (1943); or a mixed issue of federal and state law, *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) (permitting plaintiffs to withhold from the state forum federal constitutional issues); ambiguous state statutes which may be interpreted to avoid constitutional issues,

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[3] It should be noted that the instant case, although involving challenges to withdrawal of good time credits of the three respondent inmates, based these on abuse of such constitutional rights as First Amendment's Freedom of Speech (Katzoff) and Fourteenth Amendment's due process in disciplinary procedures (Kritsky, Rodriguez).

[4] ALI, STUDY ON THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 282-298 (1969); Shoenfeld, American Federalism and the Abstention Doctrine in the Supreme Court, 73 Duke L. Rev. 605 (1969); Note, 73 Harv. L. Rev. 1358 (1960).

Reetz v. Bozanich, 397 U.S. 82 (1970) and, on pending suits in state courts on the same issues, see *Abele et al. v. Markel*, Civ. No. 14291 (D.Conn. 1971).

The doctrine, however, is almost universally invoked to ease tensions between federal courts and state legislatures, not state courts. Providing a state court with the opportunity to interpret a state statute does not emanate from concern about interfering with the state court, but from a concern with the dignity of the legislature and the meaning of the legislation. Allowing a state court to deal with intricate administrative remedies and regulations does not result from concern about interfering with the state court, but with articulating the intent of a totality of quasi-legislative acts. Where the regulations are clear, or the issue unencumbered, the *Pullman* doctrine would not allow abstention. Since a prison is not such a quasi-legislative body, abstention would not be proper here.[5]

Second, and more importantly, the abstention doctrine has virtually never been applied to cases involving basic constitutional rights. See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Zwickler v. Koota*, 389 U.S. 241 (1967); *Harman v. Forssenius*, 380 U.S. 528 (1965).[6]

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[5] Although prison administrators must typically administer a substantial web of living and disciplinary regulations for prisoners, these rarely can be traced to any detailed statutory mandate other than the broad delegation of such administrative authority. Nor are these regulations, in purport or nature. Issues in this area relate chiefly to abuse of broadly defined discretion or failure, as in this case, to follow relatively simple and clear statutory or administrative directives.

[6] In *Zwickler* this Court declared that in any case, abstention should be invoked only in "special circumstances" and that in cases involving basic constitutional rights, abstention was almost never proper, even if the factors of state legislation, or administrative regulation, were present. *Dunn* and *Harman* found that abstention was improper in voting rights cases.

As one writer has noted:

> *The abstention doctrine, then, assumes that there is no general rule that state judicial remedies should be exhausted.* The Supreme Court would not so carefully limit the circumstances in which abstention is appropriate if general deference to state judicial processes were always necessary. Furthermore, *there is no sound policy reason for requiring the exhaustion of state judicial remedies. The choice is not between different types of adjudicatory proceedings, one of which may, as in the case of an administrative hearing, provide a more flexible and expert approach to the problem. Nor is it necessary that relief in federal court will disrupt a comprehensive state regulatory scheme.* The question is simply whether one court or another is going to decide the case. Certainly the availability of alternative state and federal forums is no novelty to our federal system. There may, of course, be an extra burden imposed on the federal courts if litigants tend to choose the federal forum. But *as long as a federal cause of action has been created and appropriate jurisdiction been conferred, it is not for a court to inquire into the burden which Congress has imposed.*
>
> Note, 68 Colum. L. Rev. 1201, 1205-6 (1968) (Emphasis added)

This same approach has been applied to the issue of when federal courts should exercise jurisdiction in connection with injunctions against state court proceedings. In *Younger v. Harris*, 401 U.S. 37 (1971), this Court held that federal courts should not normally issue injunctions against pending state court criminal proceedings, but this was soon modified when the Court recognized that basic

constitutional rights protected under §1983 must be considered an exception to this doctrine. *Mitchum v. Foster*, 407 U.S. 225 (1972).

Thus, the approach which this Court has taken in state-federal "comity" issues appears to be: where a pending state court proceeding is underway, or where anti-injunction federal court action might jeopardize relations with state legislatures or quasi-legislative bodies, or where the issue at hand is whether a state court acted properly in conducting a prior proceeding (*habeas corpus*), it may be justifiable for the federal system to require the party to first seek redress in state court systems. In this context, the current requirement of exhaustion in *habeas corpus* litigation fits snugly. Whether brought by a prisoner attacking his court conviction, *Fay v. Noia*, 372 U.S. 391 (1963); or a conviction yet to be served, *Peyton v. Rowe*, 391 U.S. 54 (1968); whether while on parole, *Jones v. Cunningham*, 371 U.S. 236 (1963); or after release, cf. *Carafas v. LaVallee*, 391 U.S. 234 (1968), the essence is an attack upon a prior adjudication of a state court. Here, then, there is a potential direct conflict with a branch of state government–a state court. To allow that same state system to deal initially with the complaint, as in abstention or injunctions of state court proceedings, effectively acts as a safety valve against state-federal friction.

No such situation is involved in a Civil Rights suit brought under §1983, particularly those brought by prisoners. No state legislative act is directly attacked, and no state court proceeding–pending (§2283) or past (*habeas corpus*)–is challenged. To the extent that a state statute was involved in this case, the issue was compliance with its clear provisions rather than any challenge or attack on those provisions. Nor is there a complex administrative interpretation involved. Deference to state courts, therefore, is unwarranted, and the primacy of federal court jurisdiction established by 28 U.S.C. §1331 is appropriately invoked.

Furthermore, the practical difficulties of requiring exhaustion in any §1983 case are considerable. Would a plaintiff, forced to go to state court first, find himself bound by *res judicata* in the federal court claim if not satisfied with the state court decision?[7] If so, does this not effectively preclude federal jurisdiction? If the answer is that the state court decision is binding only if it is fair and correct, or if the remedies are "adequate", does this not potentially involve the federal courts in overviewing every constitutional decision the state courts render? Would it not require that federal courts determine the "adequacy" of state court remedies including, perhaps, the adequacy of the constitutional analysis and perhaps even of the judgment of state trial judges–thereby adding to, rather than diminishing, the state-federal friction?

As Paul Chevigny has argued:

> "[the present rule of non-exhaustion] keeps federal district court judges from having to exacerbate state federal relations by explicitly finding inadequacies in state remedies every time they agree to hear a §1983 action".
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> Chevigny, Comment, 83 Harv. L. Rev. 1352 (1970)

D. The Burden of Determining Whether Exhaustion is to be Required in Cases of This Kind Should be with Congress, not with this Court

The complexities which these and many other issues of exhaustion might well raise are good reasons for this

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[7] We have already seen that at least one authority believes this to be the case. Note, 82 Harv. L. Rev. 1486, 1503 (1969), quoted *supra*, p. 14.

Court, as a judicial body, to refrain from holding that §1983 must be reinterpreted and re-analyzed to exclude what has always been thought to come under its aegis-original jurisdiction of constitutional claims of citizens of the United States against state officers. If that re-evaluation is to take place, it would seem that Congress is the proper forum for that activity, as was the situation with the *habeas corpus* remedy. After *Fay v. Noia*, 372 U.S. 391 (1963), the question arose as to whether state prisoners would have to exhaust all their state remedies and under what situations. The *Fay* doctrines of deliberate bypass and waiver left many questions unanswered, and lower courts were left in a somewhat unclear and uncertain position. To clarify these points and to consider all of the issues to be balanced in determining a fair and equitable solution, including the public perception, it was Congress that provided the answer to the lower federal courts. Congress responded and rewrote 28 U.S.C. §§2254 and 2255, and required exhaustion of state judical, and where available, administrative remedies.

Habeas corpus is not the only area in which Congress has required exhaustion. In cases of collection of state taxes, 28 U.S.C.A. §1341 and state utility orders, 28 U.S.C.A. §1342, Congress has so required. If §1983 is too broad or sweeping or unduly burdens lower federal courts or the federal judicial system, it is the national legislative apparatus which should accept responsibilities and respond. Congress should weigh the conflicting interests and questions which such a complex and intricate re-alignment would require with full attention to evolving capabilities and stresses at play in both federal and state court systems and contemporary needs for effective preservation of constitutionally-protected values.

This Court has always recognized that where detailed administrative and practical necessities are involved, the

legislature is the proper forum to rewrite existing legislation. As one writer has said:

> Of course Congress has the power to limit the cause of action or the jurisdiction of the federal court to cases in which an available state remedy has been exhausted. Whether Congress intended so to restrict §1983 was one of the issues presented in *Monroe v. Pape.* The Court's apparent conclusion that §1983 was not limited to cases where state judicial remedies had been exhausted is sound, particularly since where Congress has intended such a limitation, its intent has been expressed in clear language.
>
> Note, 68 Colum. L. Rev. 1201, 1206 (1968)

This, *amicus* believes, is the course that should be followed in this case. Over a decade of clear precedent firmly establishes that §1983 does not require exhaustion of remedies for any citizen asserting its protections, including a convicted offender. If there is to be a change in that statute and in its coverage, or if specific kinds or groups of citizens are to be required to exhaust their state court remedies before introducing an action in federal court it would seem that it is the duty and responsibility of the Congress to decide how and when those divisions should be made. For this Court to determine that exhaustion is required without the benefit of full public and legislative hearings and a reassessment of the complex difficulties involved, would, in a very real sense, impel this Court toward a legislative role. The Court has always avoided that path and should do so now.

II. PRISONER'S RIGHTS SUITS UNDER §1983 GENERATED DURING THE 1960's BY IMPORTANT CHANGES IN FEDERAL LAW AND INMATE STATUS, ARE NOW LEVELLING OFF AND PRESENT NO GREATER BURDEN ON FEDERAL COURTS THAN OTHER FEDERAL CIVIL COMPLAINTS

Much has been made of the growth in the volume and complexity of prisoner litigation being filed in state and, to a greater extent, federal courts. Indeed, one of the themes underlying the present controversy over the proper scope of federal judicial involvement in matters of state prison administration has been the practical assertion that this involvement may place undue burdens on the federal court system and its sound administration.[8]

While it is true that prisoners' complaints have increased dramatically over the past decade (2,609 to 16,267

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[8] All seven opinions filed in the court below reflect a concern for the burgeoning number of petitions filed by state prisoners in federal courts. *Rodriguez and United States ex rel Rodriguez v. McGinnis*, 456 F. 2d 79 (2nd Cir. 1972) (in banc). Judge Smith, in addressing this issue, stated:

> Moreover, I question the desirability of even attempting to lighten our burden by stifling or delaying prisoners' complaints of unconstitutional abuse. It may be an onerous burden, especially in districts where large state prisons are located. Many petitions are poorly prepared, confusing and mendacious. They do take the time of busy courts. But these cases now before us demonstrate that among them are some of substance, a circumstance which makes the effort worthwhile. It would be far better to provide more assistance in the districts which contain Attica and other large institutions giving rise to these issues than to deny redress within the federal court system for deprivation of civil rights. *Id* at 82.

from 1961-1972)[9] examination of the data compiled by the Administrative Office of the United States Courts confirms two points: (1) prisoner complaints have, in the recent past (1971-1972), increased proportionately *less* than virtually any other kind of civil litigation; and (2) there is reason to believe that the rapid increase in such suits has levelled off, and will decline as prison systems respond to underlying inadequacies and as alternative methods of delivery of legal services and are made available to prisoners.

In particular, although the rise of state prisoner petitions filed in federal courts under 42 U.S.C. §1983 have engendered a feeling of frustration within the federal judicial system, this growth too should be viewed in proper perspective. The overall rate of increase in civil cases commenced by state prisoners over the last ten years virtually parallels that of private civil actions during the same time frame[10]. However, a number of factors, including (1) prisoner unrest during the 1960's, partially shaped by an increasing awareness throughout our leadership of the pitiful state of our prisons; (2) changes in federal procedure; and (3) the reinvigoration of §1983, have made inevitable the increased use of civil rights statutes by state prisoners

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[9] See Appendix A, "Table 17–Prisoner Petitions filed in United States District Courts Fiscal Years 1961 and 1966 to 1972", 1972 Annual Report of the Director, Administrative Office of the United States Courts. (Hereafter cited as 1972 Annual Report.)

[10] See, Appendix B, "Graph–Civil Cases Commenced Fiscal Years 1961-1972)," 1972 Annual Report. Indeed, the Annual Report reveals that in 1961 civil rights petitions accounted for only .5% of all civil cases commenced in the United States District Courts while prisoner petitions (including civil rights actions brought by prisoners) accounted for 4.5% of all filings. In 1972 we find that civil rights petitions have increased ninefold. By contrast, prisoner petitions, up to 17% of the total civil cases filed, are only four times the 1961 level.

as a vehicle for obtaining federal rights and challenging unconstitutional prison conditions.

A. Increasing Prisoner Unrest, the Inherent Limitations of Federal *Habeas Corpus* and the Impact of *Monroe v. Pape* and Subsequent Rulings have Resulted in a Temporary Increase in Suits Filed by Prisoners Under §1983

A rash of disturbances, work stoppages and tragedies, many involving loss of human life, have swept prisons and jails in New York, Pennsylvania, Ohio, Virginia, New Jersey, Indiana, Florida, the District of Columbia, and California, to name a few. A common thread running through these upheavals is the desire of prisoners to alleviate intolerable living conditions and to regain self-respect lost through a degrading and brutalizing process that is prevelant in far too many prisons today. As one state corrections administrator observed:

> [M]y belief is that [the prisoners'] real problem is their frustrated desire to be treated in a more human way with more fairness in all the subtle contacts between inmates and staff.
>
> . . . We have given prisoners a little more of academic education, vocational training and relaxed rules which permit them to talk in the dining room and to walk casually down the hall . . . These changes suggest to the prisoner that maybe he should be treated like a human being, so this whets his appetite for a more complete accomplishment of a goal of human dignity. However, having whetted his appetite, we have denied him fulfillment in actuality because the prison is still a place where custodial personnel

view prisoners as unworthy beings and in countless little ways reinforce this view with meaningless rules and endless punishments.

Letter from Paul W. Keve,
Commissioner of Corrections,
State of Minnesota, to the
President's Commission on the
Causes and Preventions of Violence,
October 9, 1968

And the President has stated:

The time has come to repudiate once and for all the idea that prisons are warehouses for human rubbish; our correctional systems must be changed to make them places that will correct and educate.

Richard M. Nixon
Address to National Conference on the
Judiciary, Williamsburg, March 11, 1971

With such candor and criticism by those responsible for either the policies governing or the operation of our prisons, it should come as no surprise that prisoners have responded by filing law suits seeking reform. This peaceful effort at self-help has been both constructive and pervasive.

Second, although federal *habeas corpus* petitions have traditionally constituted the largest single category of filings by state prisoners and remains so today, the percentage of *habeas* petitions filed in federal courts is declining.[11] This

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[11] See Appendix A. In 1970, prisoner *habeas corpus* petitions reached their zenith and accounted for 12.2% of the total civil cases filed. By 1972, this figure had dropped to 9.7% while the volume of civil cases had increased over 10% during the same two year period.

drop-off in the rate of increase of federal *habeas* petitions is consistent with the general levelling off trend of all prisoner cases and in no way suggests that petitions which formerly would have been filed under the federal *habeas corpus* statutes are now gaining direct access to the federal courts as distorted §1983 actions.

The basic legislative and judicial limitations implicit in concept of federal *habeas corpus* have remained basically unchanged, although strict construction of the "in custody" theory of jurisdiction has experienced some relaxation. See, *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Peyton v. Rowe*, 391 U.S. 54 (1968); *Jones v. Cunningham*, 371 U.S. 236 (1963). Likewise, the rule, first enunciated in *Ex Parte Royal*, 117 U.S. 241 (1886), that federal courts may require exhaustion of state remedies prior to hearing a state prisoner's *habeas corpus* claims has undergone modification. *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963). But in no sense is *habeas corpus* the normal path for those who, while not attacking their conviction, seek to be relieved of conditions of their confinement. Of course, it can be argued that every restriction in a prison setting is due to the conviction, and to that extent, a suit to remove those restrictions attacks the results of conviction. But it would distort the entire history of *habeas corpus*, as well as the thrust of §1983, to suggest that these are attacks on the "confinement" itself. It is true that some prisoner complaints have been brought under *habeas corpus*, rather than under §1983, but these have been almost uniformly attacks upon confinement in solitary confinement, See e.g. *Howard v. Smith*, 365 F. 2d 428 (4th Cir. 1966); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962); *Abernathy v. Cunningham*, 393 F. 2d 775 (4th Cir. 1968). Two factors distinguish these cases: (1) release from a particular confinement was sought, thus making *habeas* a satisfactory remedy; and (2) in such cases, exhaustion would be unnecessary, since delay would be

unconscionable, in any event. *Habeas corpus,* then, is generally perceived as a remedy which seeks to overturn the direct consequences of conviction and one which attends the validity, as opposed to the conditions, of confinement. See, *Edwards v. Schmidt,* 321 F. Supp. 68 (W.D. Wisc. 1971).

Last, and highly significant to the surge of prisoner complaints brought under §1983, is this Court's decision in *Monroe v. Pape,* 365 U.S. 1967 (1961). Although not factually related to the rights of prison inmates, *Monroe* concluded that the purpose of the Civil Rights Act was to provide a federal remedy for violation of constitutional rights by state officials, regardless of whether the petitioner had first exhausted state remedies. Prior to *Monroe,* federal courts had generally followed a "hands-off" approach to civil suits brought by prisoners. The oft repeated reasons used to justify the "hands-off" approach were: (a) that the Eighth Amendment's prohibition against cruel and unusual punishment did not apply to the states, (b) reluctance to interfere in the internal discipline of state prisons, and (c) the need to utilize state remedies in the first instance. *Wright v. McMann,* 387 F.2d 519 (1967). Thus, *Monroe* effectively abrogated the "hands-off" doctrine under which correctional administrators had for so long operated free of federal judicial review.

Any remaining uncertainty that the "hands-off" approach might still be selectively applied to prisoners as a separate class was eliminated soon after the *Monroe* decision. *Robinson v. California,* 370 U.S. 660 (1962), which found that the Eighth Amendment applied to the states through the Fourteenth Amendment, and *Cooper v. Pate,* 378 U.S. 546 (1964), a decision holding that refusal to permit a prisoner access to religious publications stated a cause of action, made explicit the applicability of the Civil

Rights Act to state prisoner's claims of unconstitutional treatment. In the aftermath of these decisions, it was only logical that prisoners, with an emerging sense of political consciousness and personal outrage, should attempt to avail themselves of appropriate judicial remedies. It is no coincidence that with this abandonment by the courts of the hands off doctrine the first meaningful reform in the conditions and treatment of prisoners has occurred.

B. Prisoner Petitions Filed Under §1983 are Increasing at a Slower Rate and Involve Proportionately Less Trials than Most Other Civil Suits

Analysis of data collated by the Administrative Office of the United States Courts shows that while prisoner suits filed during fiscal year 1972, including those filed under §1983, increased some 1% over 1971, this was actually smaller than the 3% increase of all civil suits.[12]

Litigation in commerce clause cases, deportation cases, social security actions, forfeiture and penalty suits, and civil rights actions generally all involved a noticeably higher increase rate than prisoner suits:

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[12] See, Appendix C, "Table 16—Civil Cases Commenced in the United States District Courts During the Fiscal Years 1961-1972, by Nature of Suit", 1972 Annual Report. §1983 suits today constitute less than 21% of all prisoner filings in federal courts (with 57% for federal *habeas*, and 22% for all other prisoner petitions filed in federal courts).

Type of Case	Increase in 1972 Over 1971
ICC cases	65.6%
Deportation cases	42.9%
Social Security Actions	27.7%
Forfeiture and Penalty Suits	26.3%
Civil Rights Actions (not including prisoners' Civil Rights Actions)	19.4%
Mortgage foreclosures	16.5%
Prisoner Petitions	0.0%*

(*There was *one* more prisoner petition filed in 1972 than in 1971, as compared with increases of 1.7% in 1971 over 1970, and 23.8% in 1970 over 1969).

Additionally, there is good reason to believe that the increase of prisoner civil rights actions is only temporary. A study of petitions filed by state and federal prisoners over the last ten years shows that filings increased dramatically during the mid-sixties followed by a levelling off period from 1969 to the present.[13] This suggests that any crisis in the federal caseload occasioned by an influx of §1983 and other cases filed by state prisoners is, at worst, transitional and, at best, over.

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[13] See, Appendix D, "Graph–Petitions Filed by State and Federal Prisoners", 1972 Annual Report.

As the following tables demonstrate, prisoner §1983 actions constitute only a negligible percentage of the total federal civil caseload. In fact, the rate of increase of these cases is not only falling, but falling more rapidly than other civil rights actions commenced during the last two years.

TABLE I. Total Prisoner–Civil Caseload Comparison

	1968	1969	1970	1971	1972
Percentage of Prisoner Civil Rights Cases to Total Prisoner Cases	9.6%	9.8%	12.7%	17.9%	20.6%
Percentage of Prisoner Habeas Corpus Cases to Total Prisoner Cases	67.5%	67.6%	66.6%	61.7%	57.3%
Percentage of Prisoner Civil Rights Cases to Total Civil Cases	1.5%	1.7%	2.5%	3.4%	3.7%
Percentage of Prisoner Habeas Corpus Cases to Total Civil Cases	10.5%	11.3%	12.2%	10.7%	9.7%
Percentage of Total Prisoner Cases to Total Civil Cases	15.6%	16.7%	18.3%	17.4%	16.9%

TABLE II. Civil Rights Actions–Prisoner and Other

	1968	1969	1970	1971	1972
Total Civil Rights Cases Commenced in Federal Courts	2768	3803	6151	8267	9733
Total Prisoner Civil Rights Cases Commenced in Federal Courts	1132	1350	2166	3129	3600
Total of Other Civil Rights Cases Commenced in Federal Courts	1636	2453	3985	5138	6133
Increase of Total Civil Rights Cases Over Previous Year	–	37.3%	61.7%	34.1%	17.7%
Increase of Prisoner Civil Rights Cases Over Previous Year	–	19.2%	60.4%	44.4%	15%
Increase of Other Civil Rights Cases Over Previous Year	–	49.9%	62.4%	26.6%	19.4%

The 1972 Report of the Director of the Administrative Office further states that any rise in civil rights filings by prisoners will more than likely be offset both by the steady improvement of post-conviction remedy systems and the increased availability of counsel for indigent petitioners to assess the practicality of many *habeas corpus* petitions. The 1972 Annual Report also notes that this Court's opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), a decision which set aside the sentence of over 600 death row inmates, removes from the federal courts numerous petitions of a highly complex and time-consuming nature and should go far toward easing federal court workloads.[14]

Similarly, the proposition that civil rights actions consume more court time owing to the frequent necessity of a court hearing and the more liberal discovery techniques provided for under the Federal Rules of Civil Procedure, does not stand up under scrutiny:

> A sample of 100 private civil rights cases reported in the Federal Supplement from December, 1966 to March, 1968, shows that sixty-seven were dismissed without a trial or hearing, the vast majority on the face of the complaint. This statistic suggests that §1983 cases even now are quickly disposed of and posed little time problem for federal courts. In the remaining thirty-three cases, plaintiffs obtained preliminary relief in twelve without an evidentiary hearing. Only seven cases appear to have been tried, and five of those resulted in a judgment for the plaintiff. Most important, the seventeen cases in which the plaintiff had judgment involve important civil rights issues.
>
> Chevigny, Comment, 83 Harv. L. Rev. 1352, 1357 (1970)

[14] 1972 Annual Report at 31, 32.

The Administrative Office statistics show, further, that prisoner §1983 actions result in a smaller proportion of trial hearings than virtually any other kind of civil action. (3.4% as opposed to 16.1% for general civil rights actions; 13.2% for patent actions and 15.6% for actions brought under the Fair Labor Standards Act.)[15] Also, the trial rate is not significantly larger for §1983 actions than for federal *habeas corpus* actions (3.4% as opposed to 3%).[16]

Indeed, it may well be that the availability to state prisoners of the federal forum and its rules of procedure will, in the long run, reduce the volume of their complaints. The federal class action, a procedural device not generally transferable to *habeas corpus* proceedings, provides a mechanism for litigating constitutional issues which affect large numbers of an inmate population. Landmark decisions have already established precedents which place state correctional administrators on notice of acceptable standards for prison conditions and operation and have stirred both the public and private sectors to a renewed sense of concern and urgency over prison deficiencies.[17]

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[15] See, Appendix E, "Table C.4.–Civil Cases Terminated During the Fiscal Year Ended June 30, 1972 by Nature of Suit and Action Taken", 1972 Annual Report.

[16] *Id.*

[17] The impetus for these decisions can probably be traced back to the case of *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966). In *Jordan*, Chief Judge George Harris, registering an acute sense of outrage over the conditions he saw at California's Soledad prison complex, took steps to "restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States". Federal appellate courts have subsequently ordered or initiated sweeping relief when prison conditions or practices deny to prisoners federally protected rights. See, e.g., *Nolan v. Fitzpatrick*,

(Continued on page 33)

C. Development of Alternative Mechanisms for the Resolution of Potential Prisoner Court Claims Promises to Reinforce the Recent Stabilization of Prisoner Petitions, and Reduce the Federal Caseload in this Area

Rapidly developing new resources for the delivery of legal services and viable non-judicial alternatives for the resolution of prisoner complaints and grievances promise to reinforce the downtrend of the last three years.

It is well documented that the prisoner, often confined in remote institutions far from home, family and friends, is urgently in need of a broad range of legal guidance and assistance probably more so than indigents in the community-at-large.[18] Prisoners' right of access to the courts, recently affirmed by this Court in *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D.Cal. 1970), aff'd. *sub. nom. Younger v. Gilmore*, 404 U.S. 15 (1971); see *Johnson v. Avery*, 393 U.S. 483 (1969), can, however, be neutralized, with detrimental consequences to the court administration, if a prisoner is incapable of making himself heard and,

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(Footnote 17 continued from page 32)

451 F. 2d 545 (1st Cir. 1971); *Gray v. Creamer*, 465 F. 2d 179 (3rd Cir. 1972); *Brown v. Peyton*, 437 F. 2d 1228 (4th Cir. 1971); *Jackson v. Godwin*, 400 F. 2d 529 (5th Cir. 1972); *Jones v. Metzger*, 456 F. 2d 854 (6th Cir. 1972); *Hahn v. Burke*, 430 F. 2d 100 (7th Cir. 1970); *Moore v. Ciccone*, 459 F. 2d 574 (8th Cir. 1972); *Earnest v. Willingham*, 406 F. 2d 861 (10th Cir. 1969).

18 " 'Jailhouse Lawyers'—inmates with a claimed expertise of a kind—are often the only help a prisoner has . . ." National Council on Crime and Delinquency, A Model Act for the Protection of Prisoners, 14 (1972). See generally, Jacob and Sharma, Justice After Trial: Prisoner Need for Legal Services in the Criminal Correctional Process, 18 Kan. L. Rev. 493 (1970); Goldfarb & Singer, Redressing Prisoner Grievances, 39 G.W.L.Rev. 175 (1970).

hopefully, understood. According to the American Bar Association's Criminal Justice Standards Project:

> The best way to stem the flow of applications and, conversely, to bring forward meritorious applications, is to educate the prisoner population on the respective utility and futility of applying. The optimal form of education would involve face-to-face interviews between prisoners and attorneys who could advise them of the probable merits or lack of merit in their grievances.
>
> Standards Relating to Post-Conviction Remedies 50 (Approved Draft 1968)

Put simply, prisoners have attempted to do for themselves what the legal profession and others have failed to do for them. Recognition of this crushing need on the part of prisoners for legal advice and counselling has evoked a variety of encouraging responses both private and public.

A recent report of the United States Department of Justice reveals that 43.2% of the nation's law schools are now engaged in the provision of a wide variety of legal services to prisoners through supervised clinical legal education programs.[19] Of these, approximately two-thirds have commenced since 1969. The American Bar Association's Commission on Correctional Facilities and Services reports that twenty-one state, and fourteen local bar associations have ongoing correctional reform committees. The Texas

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[19] Summary Report, "Perspectives on Prison Legal Services: Needs, Impact and the Potential for Law School Involvement", United States Department of Justice (1972). The Council on Legal Education for Professional Responsibility, a privately funded program, has made grants to the law schools of fifteen universities to provide support for clinical programs in corrections. C.L.E.P.R. Newsletter, Volume IV, No. 13, May 1972.

Criminal Justice Council, responding to a decision of the Fifth Circuit which held that a Texas Department of Corrections regulation against "jailhouse lawyer" assistance could not be permitted to stand absent provision of a reasonable alternative, *Novak v. Beto,* 453 F. 2d 661 (1971), allocated substantial federal anti-crime funds for hiring attorneys and establishing law libraries for inmates.

Finally, the concept of establishing a state correctional ombudsman, long an accepted method of resolving prisoners' grievances in European correctional systems, is beginning to gain currency and stimulate experimentation in this country. At least fifteen separate jurisdictions either have already instituted ombudsmen or have programs on the drawing boards.[20] Private organizations such as the American Bar Association's Resource Center for Correctional Law and Legal Services, the District of Columbia's Center for Correctional Justice, and the National Center for Dispute Settlement of the American Arbitration Association are developing prototypes and providing technical assistance to groups wishing to establish institutional grievance procedures or other mechanisms for the negotiation of prisoner complaints. The development of these mechanisms to mediate the problems of our correctional systems and the offenders in their custody has been recognized as critically important to the problem of unreasonable demands on courts and the litigation process.

The foregoing suggests that however real the case load problems may be in a period of judicial and offender activism, the solution lies less with rearrangement of existing concepts of exhaustion of judicial remedies than with the development of administrative and non-litigation

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[20] These jurisdictions include: Arizona, California, District of Columbia, Illinois, Iowa, Massachusetts, Maryland, Minnesota, New Jersey, New York City, New York State, Ohio, Oregon, Pennsylvania and Washington.

alternatives for redress now on the horizon. Utilization of these new and more responsive administrative remedies (including their exhaustion prior to seeking court redress) adds to the hopeful signs for the further reduction in prisoners' court actions.

CONCLUSION

For the above reasons, amicus respectfully urge this Court to affirm the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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Chicago, Ill.

Robert Meserve, President
Robert Kutak
William Falsgraf
Richard Hughes
Daniel Skoler
Richard Hand
Richard Singer

I, Robert Meserve, attorney for amicus, hereby certify that 3 copies of this brief were duly served upon attorneys for both parties by mail service, postage pre-paid.

_____

Robert Meserve

Table 17
Prisoner Petitions Filed in the U.S. District Courts
Fiscal Years 1961 and 1966 to 1972

Type of petition	Fiscal years								Percent change	
	1961	1966	1967	1968	1969	1970	1971	1972	1972 over 1961	1972 over 1971
Total all petitions	2,609	8,580	10,983	11,152	12,924	15,997	16,266	16,267	523.5	--
Petitions by Federal prisoners	1,589	2,292	2,649	2,851	3,61.	4,185	4,121	4,179	163.0	1.4
U.S. Parole Board reviews	161	64	104	141	150	232	202	288	66.5	42.7
Motions to vacate sentence	560	864	978	1,099	1,444	1,729	1,415	1,681	189.1	18.8
Habeas corpus	868	1,017	1,045	1,045	1,374	1,600	1,671	1,368	57.6	-18.1
Other prisoner petitions	(1)	348	532	576	693	624	813	952	174.6	8.3
Mandamus, etc	-	349	474	516	564	488	699	700	100.3	0.1
Civil rights	-	15	58	60	81	136	214	252	1,580.0	17.8
Petitions by state prisoners	1,020	6,288	7,804	8,301	9,312	11,812	12,145	12,088	1,085.1	-0.5
Habeas corpus	1,020	5,349	6,201	6,488	7,359	9,063	8,372	7,999	679.3	-5.1
Other prisoner petitions	(1)	909	1,603	1,813	1,953	2,749	3,773	4,139	355.3	9.7
Mandamus, etc	-	691	725	741	684	719	858	791	14.5	-7.8
Civil rights	-	218	878	1,072	1,269	2,030	2,915	3,348	1,445.8	14.9

[1]Included with habeas corpus.

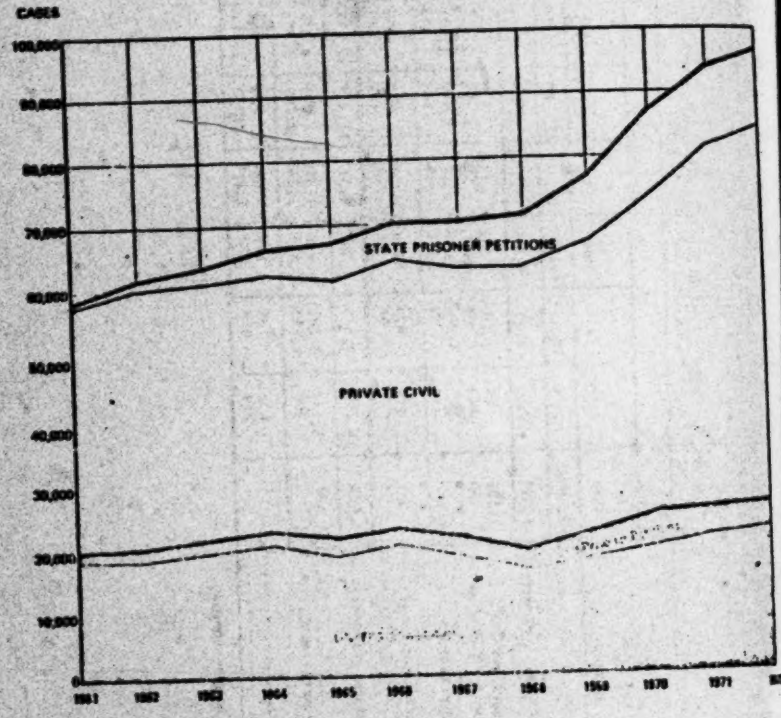
APPENDIX B

II-26

UNITED STATES DISTRICT COURTS

CIVIL CASES COMMENCED

FISCAL YEARS 1961–1972



Source: Administrative Office of the United States Courts.

APPENDIX C

Table 16

Civil Cases Commenced in the U.S. District Courts During the Fiscal Years 1961-72, by Nature of Suit

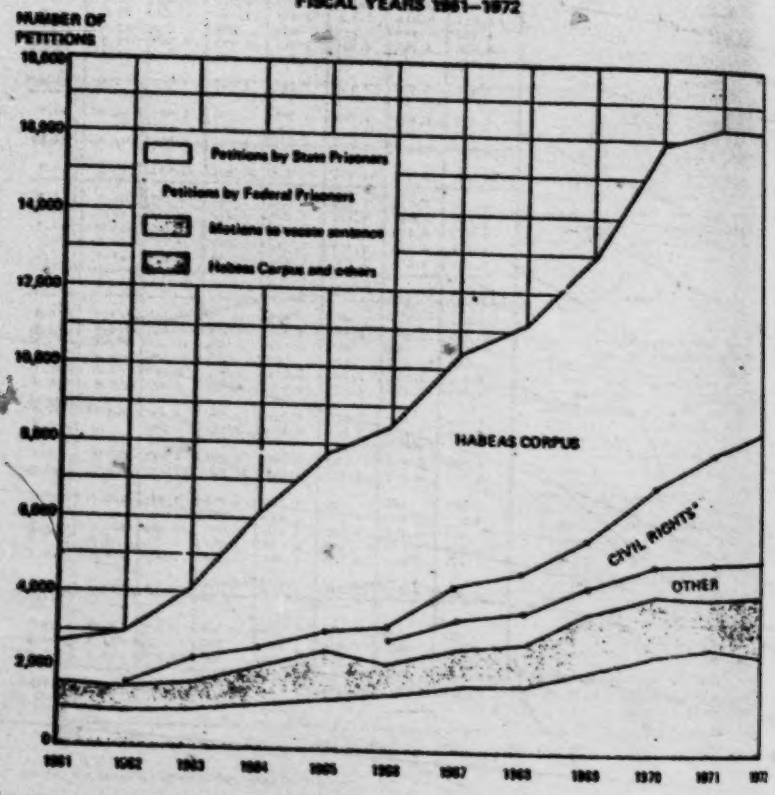
Nature of Suit	Cases filed						Percent Change 1972 over 1961	Percent Change 1972 over 1971
	1961	1968	1969	1970	1971	1972		
Total	58,293	71,459	77,196	87,321	93,396	96,173	65.0	3.0
Contract actions	16,349	18,474	18,951	17,157	16,535	16,977	16.1	2.2
Insurance	1,586	2,372	2,381	2,522	2,732	2,572	62.6	-5.9
Marine	2,412	2,859	2,636	3,496	3,649	3,681	40.2	-4.9
Miller Act	1,333	915	735	916	718	572	-57.1	-20.3
Negotiable instruments	4,070	3,388	2,567	2,971	2,996	3,205	-21.3	6.9
Other	6,939	8,149	8,430	7,252	6,497	6,947	33.3	6.8
Real property actions	3,317	3,979	3,737	3,284	3,600	3,554	6.8	-1.5
Mortgage foreclosure	1,326	1,946	1,664	1,349	1,648	1,921	44.9	16.6
Land Condemnation	997	920	1,020	890	891	602	-39.6	-32.4
Other	1,663	1,113	1,053	1,045	1,069	1,030	2.7	-3.6
Tort actions	21,305	23,979	24,713	25,329	25,485	24,012	11.2	-5.5
Employers' Liability Act	1,114	1,074	1,293	1,292	1,353	1,391	24.9	2.8
Marine	4,809	6,717	7,111	7,257	7,232	6,564	33.6	-9.7
Motor vehicle	9,083	9,679	9,504	9,963	8,779	7,700	-15.2	-12.3
Other personal injury	4,574	4,969	5,369	5,792	6,047	6,411	40.3	6.2
Property damage	1,545	1,417	1,496	1,816	1,994	1,968	27.4	-1.3
Actions under statutes	13,827	26,635	31,232	39,348	41,394	47,701	253.8	8.6
Antitrust	420	747	761	929	1,505	1,379	228.3	-8.4
Civil rights	296	1,636	2,453	3,985	5,130	6,133	1972.0	19.4
Commerce (ICC rates, etc.)	335	663	856	1,132	2,014	3,335	895.5	65.6
Deportation	316	143	129	144	119	170	-46.2	42.9
Forfeiture and penalty suits	2,340	3,029	1,203	1,459	2,831	2,565	8.7	26.3
Labor laws	2,484	3,518	3,721	3,999	4,461	4,987	100.8	6.9
Narcotic Addict Rehabilitation Act	-	387	2,011	3,268	2,725	2,430	553.7[1]	-7.2
Patent, copyright and trademark	1,585	1,829	1,865	2,150	2,042	2,194	38.4	7.4
Prisoner petitions:								
Federal	1,589	2,851	3,613	4,185	4,121	4,179	163.0	1.4
State	1,020	8,391	9,317	11,812	12,145	12,080	1085.1	-0.5
Securities, commodities and exchange	367	489	396	1,211	1,962	1,919	618.7	-2.2
Selective Service Act	(1)	(2)	(2)	447	695	291	-	-58.6
Social Security laws	537	1,108	1,572	1,735	1,702	2,296	326.1	27.7
Tax suits	1,557	1,670	1,452	1,509	1,464	1,464	-2.9	-
Other	711	964	1,470	1,383	1,324	1,989	179.7	49.1
Other actions	3,995	2,442	2,540	2,212	2,058	2,130	-46.7	3.5
Domestic relations (local jurisdiction)	393	648	700	758	758	938	138.7	23.7
Insanity (local jurisdiction)	2,541	820	816	536	317	272	-89.3	-14.2
Other	1,061	994	1,044	918	983	920	-13.3	-6.4

[1]Percent change since fiscal year 1968 when Title III, Narcotic Addict Rehabilitation Act took effect.
[2]Included with other.

UNITED STATES DISTRICT COURTS

PETITIONS FILED BY STATE AND FEDERAL PRISONERS

FISCAL YEARS 1961–1972



*"Civil Rights" prior to 1966 are included in "Other Prisoner Petitions".

Source: Administrative Office of the United States Courts.

APPENDIX E

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LA VALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KATZOFF and JOHN KRITSKY,

Respondents.

REPLY BRIEF

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TABLE OF CONTENTS

PAGE

A. Habeas Corpus is the only appropriate remedy for reviewing state prisoners' claims relating to the conditions of their confinement 1

B. Application of § 2254 to prisoner claims would protect the interests of the federal and state courts without impairing the prisoners' interest in prompt adjudication 4

Conclusion 7

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1369

Russell G. Oswald, Commissioner of Correctional Services; Paul J. Regan, Chairman of the Board of Parole; J. Edwin La Vallee, Superintendent of Clinton Correctional Facility; John T. Deegan, Superintendent of Auburn Correctional Facility; New York State Board of Parole; and the New York State Department of Correctional Services,

Petitioners,

against

Eugene Rodriguez, Michael Katzoff and John Kritsky,

Respondents.

REPLY BRIEF

A. Habeas Corpus is the only appropriate remedy for reviewing state prisoners' claims relating to the conditions of their confinement.

Petitioners are asking this Court to hold that state prisoners should be precluded from obtaining equitable relief under the Civil Rights Act and required instead to proceed

by way of federal habeas corpus.* Respondents deny that this classification is appropriate because (a) historically, the exhaustion requirement of the habeas corpus statute did not reach prisoner claims unrelated to conviction and sentence, (b) a habeas corpus proceeding is not a better remedy than a civil rights action and (c) in any event, the classification is barred by prevailing precedent. These reasons are unsubstantiated and without merit.

To argue the history of § 2254 is to reason backwards. Classification of prisoners' claims is a *prerequisite* to determining what, if any, exhaustion requirement attaches. Section 2254, whatever its history, is irrelevant unless and until the claims are classified as in the nature of habeas corpus. Moreover, there is nothing in the history of § 2254 which limits the scope of the habeas corpus remedy. As petitioners have already demonstrated, this Court has held that habeas corpus encompasses state prisoners' claims unrelated to conviction and sentence because all of them challenge some form of restraint (Petitioners' Br. pp. 19-20).**

Respondents' denial that habeas corpus is a better remedy is similarly insubstantial because it, too, turns on the anticipated applicability of the exhaustion requirement rather than on deficiencies in the remedy itself (Respondents' Br. p. 31). The very study of pro se litigants

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* The *amicus* brief of the American Bar Association is inapposite in this respect since it does not address itself to this issue but is limited to a discussion of exhaustion under the Civil Rights Act. Petitioners are not asking this Court to distinguish between state prisoners and *other* litigants under the Civil Rights Act. State prisoners are *already* distinguished from all other potential civil rights litigants because they have another statutory remedy for presenting their federal constitutional claims.

** This conclusion has particular force in the three cases at bar which involve good conduct time issues and, hence, directly affect the right to release from physical confinement.

which respondents cite reveals that habeas corpus applications are reviewed more expeditiously and require far less initiative on the part of the prisoner litigant. Ziegler & Kaufmann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. Rev. 157, 201-205 (1972).

In particular, the study substantiates petitioners' experience with pro se civil rights actions which often stagnate for years. The fate of many of these cases is now being investigated in the Southern District, but only as a result of the computerization and individualized assignment of cases instituted in mid-1972. A recent letter to this office from one Southern District Judge inquired about the status of seven pro se civil rights cases initiated by state prisoners. Of these, one had a 1966 docket number, one a 1969 docket number and five were docketed in 1970.

Even when the pro se litigant is assigned counsel his complaint is given no preference, unlike that of the habeas corpus petitioner. 28 U.S.C. § 2243. In one action presently being defended by this office the complaint was filed in February, 1969, counsel was assigned in July, 1970 and the case has been on the ready calendar in the Southern District since September, 1971.

Respondents also purport to rely on precedent. They cite "a host of cases" in which § 1983 jurisdiction was assumed, albeit "without discussing the habeas-§ 1983 classification problem" (Respondents' Br. pp. 15-16). In addition, they claim that "virtually every court that has explicitly dealt with the problem at issue" has held that § 1983 is available to state prisoners. However, to cite this Court's decision in *Wilwording* v. *Swenson* as authority is to ignore the fact that the proper nature of the cause of action was neither discussed in the opinion nor raised by the parties in the case who instead were solely concerned with the exhaustion requirement of § 2254 as applied to

the habeas corpus petitions there involved.* *Padilla v. Ackerman*, 460 F. 2d 477 (9th Cir.), simply relies on *Wilwording*. And to cite *Sostre v. McGinnis*, 442 F. 2d 178, 182 (2d Cir. 1971) is to deny that the Second Circuit had any reason for reviewing the instant cases *in banc*. See 442 F. 2d at 204, N. 50. In point of fact, none of the cases cited "explicitly" resolves the precise issue before this Court because in none of them was it squarely presented. Therefore, they hardly constitute reasoned, binding precedent.

B. Application of § 2254 to prisoner claims would protect the interests of the federal and state courts without impairing the prisoners' interest in prompt adjudication.

Respondents maintain that an exhaustion requirement will not reduce the number of federal lawsuits and, in any event, will be detrimental to the prisoner. The former argument is totally unrealistic unless one assumes—as respondents obviously do—that the state courts will not grant relief in appropriate cases.** That assumption is unwarranted as petitioners have shown in their main brief (Petitioners' Br. pp. 28-30, 46). Moreover, if the number of prisoner civil rights actions is levelling off, as the brief

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* There is thus no basis for respondents assumption that in *Wilwording* this Court recognized "the difference between [challenges to prison conditions] and suits seeking to set aside state court criminal judgments" for purposes of exhaustion. (Respondents' Br. pp. 17-18). This reading does not take into account the fact that in *Wilwording* exhaustion of the Eighth Amendment claims there raised was required under § 2254.

** Respondents actually suggest that the "Founding Fathers, subsequent Congresses" and this Court "all recognize" that "state remedies are simply inadequate where controversial federal rights are concerned". (Respondents' Br. p. 35). Such a statement is surprising in the context of a case involving § 2254. Nor is there any call for unsupported generalizations to the effect that the state courts are not "interested" in or "sympathetic" to prisoners' claims.

of the American Bar Association suggests, this strongly indicates that claims of state prisoners are being dealt with and resolved by state departments of correction and/or the state courts.*

Also unwarranted is respondents' reliance on the habeas corpus experience of the 1950's and 1960's. It was during that period that this Court rendered a series of far-reaching decisions affecting the rights of criminal defendants. Those decisions resulted in a burst of applications in both the federal and state courts.

The exhaustion requirement is not the only reason why reduction in federal suits must result if prisoners are confined to the habeas corpus remedy. Under the present law when a state prisoner who is unsuccessful in a civil rights action may seek relief in the state courts and, if unsuccessful, he may return to the federal court with a habeas corpus petition. Thus, because *res judicata* does not apply to a habeas corpus application, the state prisoner, unlike the ordinary citizen, has an opportunity to bring at least *two* federal lawsuits with respect to the same claims.

The facts posited are not hypothetical. This was exactly the pattern followed by the petitioners in *Wilwording* v. *Swenson*. Obviously, if the state prisoner is confined to habeas corpus at least one federal lawsuit is eliminated.

Respondents' ultimate concern is that the delay in obtaining a federal forum will deprive them of meaningful

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*It is interesting to note that although the rate of increase of prisoner civil rights actions has declined during the last two years, according to the ABA figures, so has the rate of increase of other civil rights actions. (ABA Br. p. 30). Accordingly, prisoner civil rights actions continue to represent a stable percentage of the total number of civil rights actions filed in the last five years, i.e. approximately 37% of the total.

judicial review. Although they concede that the State Courts will act expeditiously (Respondents' Br. p. 35), their fear again rests on the unsupported assumption that the state courts will be unresponsive.

The answer to this argument is that the same possibility exists in the traditional habeas corpus case. Significantly, experience with those cases demonstrates that the federal courts are capable of determining whether adequate remedies are afforded by a particular state and, as a practical matter, do so everyday. This Court made just such a determination in *Wildwording* with regard to the State of Missouri. The District Court which heard *Johnson* v. *Avery*, 252 F. Supp. 783, 784 (M.D. Tenn. 1966) made such a determination with regard to the State of Tennessee.

The exhaustion requirement of § 2254 functions as a barometer of the interest which each state has in adequately reviewing its convictions and the conditions which exist in its prisons. If a state affords no remedies it thereby indicates to the federal courts that no interest of comity is served by requiring its inmates to tender their claims to the state's courts. The inmate is free in such cases to come directly into federal court and assert his claim by way of federal habeas corpus. On the other hand, in States such as California, which has a long history of reviewing prisoner claims, and New York which also reviews these claims and, moreover, is unique in providing a specific statutory remedy for reviewing prisoners' constitutional claims relating to confi ment, comity requires that these remedies not be ignored.

If state prisoners are required to seek relief from state courts which have shown themselves responsive to prisoner claims their respect for the system which regulates their confinement must be greater than if they obtain that relief

from the federal courts.* The importance of fostering that kind of respect in the context of the prison environment is yet another reason why claims raised by state prisoners are unique.

CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Dated: New York, New York, January 3, 1973.

Respectfully submitted,

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First Assistant Attorney General

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Assistant Attorney General
of Counsel

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*A *fortiori* this is true of requiring exhaustion of adequate administrative remedies. As in the Court below, respondents have failed to disprove the relevance of administrative review in an area where the state action involved is typically and necessarily less defined by black letter regulation and more dependent on administrative discretion. This is particularly evident in their failure to draw a meaningful distinction between state and federal prisoners in this regard. At best, they refer vaguely to "other considerations" (Respondents' Br. p. 36).

In the context of the instant cases respondents err when they say that the failure to exhaust administrative remedies in *Rodriques* and *Kritsky* resulted from the failure of the superintendent to comply with §236 of the Correction Law. Nothing in that section shifts the burden of initiating administrative review away from the prisoner.

The State of New York has been authorized by the Attorneys General of the following states to add them to the list of States joining with us in our brief on the merits (Petitioners' Br. p. 48).

Honorable William J. Brown	Ohio
Honorable Larry Derryberry	Oklahoma
Honorable A. F. Summer	Mississippi
Honorable Gordon Mydland	South Dakota
Honorable James M. Jefford	Vermont
Honorable Clarence A. Brimmer	Wyoming

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

PREISER, CORRECTION COMMISSIONER, ET AL. *v.* RODRIGUEZ ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71-1369. Argued January 9, 1973—Decided May 7, 1973

Respondents are state prisoners who had elected to participate in New York's conditional-release program, by which a prisoner serving an indeterminate sentence may earn up to 10 days per month good-behavior-time credits toward reduction of his maximum sentence. For in-prison disciplinary reasons the good-time credits of each were canceled. Each respondent brought a civil rights action under 42 U. S. C. § 1983, in conjunction with a habeas corpus action, claiming that his credits were unconstitutionally canceled and seeking their restoration. The District Court in each case viewed the habeas corpus claim merely as an adjunct to the civil rights action, thus obviating the need for exhaustion of state remedies, and on the merits ruled for the respondent, a ruling that in each case entitled him to immediate release on parole. The Court of Appeals consolidated the actions and affirmed. *Held:* When a state prisoner challenges the fact or duration of his physical imprisonment and by way of relief seeks a determination that he is entitled to immediate or speedier release, his sole federal remedy is a writ of habeas corpus. Pp. 13–23.

(a) Although the broad language of § 1983 seems literally to apply, Congress' enactment of the specific federal habeas corpus statute, with its requirement that a state prisoner exhaust state remedies, was intended to provide the exclusive means of relief in this type of situation. Pp. 13–14.

(b) The policy of exhaustion in federal habeas corpus actions, which is rooted in considerations of federal-state comity, has as much relevance in an attack on the actions of the state prison administration as it does in an attack on the actions of a state court; and that policy applies here where respondents sought no

Syllabus

damages, but only a ruling that they were entitled to immediate or a speedier release. Pp. 14–18.

(c) Recent decisions of the Court, relied on by respondents, upholding state prisoners' civil rights actions, are inapposite to the situation here, for the prisoners in those cases challenged only the conditions of their confinement, not the fact or duration of that confinement itself. Pp. 21–22.

456 F. 2d 70, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1369

Peter Preiser, Commissioner of Correctional Services, et al., Petitioners, v. Eugene Rodriguez et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 7, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondents in this case were state prisoners who were deprived of good conduct time credits by the New York State Department of Correctional Services as a result of disciplinary proceedings. They then brought actions in a federal district court, pursuant to the Civil Rights Act, 42 U. S. C. § 1983. Alleging that the Department had acted unconstitutionally in depriving them of the credits, they sought injunctive relief to compel restoration of the credits, which in each case would result in their immediate release from confinement in prison. The question before us is whether state prisoners seeking such redress may obtain equitable relief under the Civil Rights Act, even though the federal habeas corpus statute, 28 U. S. C. § 2254, clearly provides a specific federal remedy.

The question is of considerable practical importance. For if a remedy under the Civil Rights Act is available, a plaintiff need not first seek redress in a state forum. *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961); *McNeese* v. *Board of Education*, 373 U. S. 668, 671 (1963); *Damico*

v. *California*, 388 U. S. 418 (1967); *King* v. *Smith*, 392 U. S. 309, 312 n. 4 (1968); *Houghton* v. *Shafer*, 392 U. S. 639 (1968). If, on the other hand, habeas corpus is the exclusive federal remedy in these circumstances, then a plaintiff cannot seek the intervention of a federal court until he has first sought and been denied relief in the state courts, if a state remedy is available and adequate. 28 U. S. C. § 2254 (b).

The present consolidated case originated in three separate actions, brought individually by the three respondents. The respondent Rodrigues, having been convicted in a New York state court of perjury and attempted larceny, was sentenced to imprisonment for an indeterminate term of from one and one-half to four years. Under New York Correction Law § 803 and Penal Law §§ 70.30 (4)(2), 70.40 (1)(a) and (b), a prisoner serving an indeterminate sentence may elect to participate in a conditional release program by which he may earn up to 10 days per month good behavior time credit toward reduction of the maximum term of his sentence. Rodrigues elected to participate in this program. Optimally, such a prisoner may be released on parole after having served approximately two-thirds of his maximum sentence (20 days out of every 30); but accrued good behavior credits so earned may at any time be withdrawn, in whole or in part, for bad behavior or for violation of the institutional rules. N. Y. Correction Law § 803 (1).

Rodrigues was charged in two separate disciplinary action reports with possession of contraband material in his cell. The deputy warden determined that as punishment, 120 days of Rodrigues's earned good conduct time credits should be cancelled, and that Rodrigues should be placed in segregation, where he remained for more than 40 days. In the "Remarks" section of the deputy warden's determination was a statement that Rodrigues

refused to disclose how he had managed to obtain possession of the items in question.

Rodrigues then filed in the District Court a complaint pursuant to § 1983, combined with a petition for a writ of habeas corpus. He asserted that he was not really being punished for possession of the contraband material, but for refusal to disclose how he had obtained it, and that he had received no notice or hearing on the charges for which he had ostensibly been punished. Thus he contended that he had been deprived of his good conduct time credits without due process of law.

After a hearing, the District Court held that Rodrigues's suit had properly been brought under the Civil Rights Act, that the habeas corpus claim was "merely a proper adjunct to insure full relief if [Rodrigues] prevails in the dominant civil rights claim," 307 F. Supp. 627, 628–629 (1969), and that therefore Rodrigues was not required to exhaust his state remedies, as he would have had to do if he had simply filed a petition for habeas corpus. On the merits, the District Court agreed with Rodrigues that the questioning of him by prison officials related solely to the issue of how he had obtained the contraband materials, and that he had been ostensibly punished for something different—possession of the materials—on which he had had no notice or opportunity to answer. This, the Court found, denied him due process of law, particularly in light of the fact that the prison regulations prescribed no penalty for failure to inform. The District Court further found that the Prison Commission Board had failed to forward to the Commissioner of Correction written reasons for the cancellation of Rodrigues's good conduct time, as required by N. Y. Correction Law § 236, and that this, too, had deprived Rodrigues of due process and equal protection of the law. Accordingly, the Court declared the cancellation of 120

days good behavior time credits unconstitutional, and directed the Commissioner of Correction to restore those credits to Rodriguez. Since, at that time, Rodriguez's conditional release date had already passed, the District Court's order entitled him to immediate release from prison on parole.

The Court of Appeals reversed this decision by a divided vote. The appellate court not only disagreed with the District Court on the merits, but also held that Rodriguez's action was really a petition for habeas corpus and, as such, should not have been entertained by the district court, because Rodriguez had not exhausted his state remedies in accordance with § 2254 (b). As the Court of Appeals put it:

"The present application, since it seeks release from custody, is in fact an application for habeas corpus. '[R]elease from penal custody is not an available remedy under the Civil Rights Act.' *Peinado v. Adult Authority*, 405 F. 2d 1185, 1186 (9th Cir.), cert. denied, 395 U. S. 908 (1969). In *Johnson v. Walker*, 317 F. 2d 413, 419–420 (5th Cir. 1963), the Court said: 'Use of the Civil Rights Statutes to secure release of persons imprisoned by State Courts would thus have the effect of repealing 28 U. S. C. § 2254; of course, such was not the intent of Congress.'" 451 F. 2d 750, 751 (1971).

The judgment of the Court of Appeals was subsequently set aside, and the case was reheard *en banc*, as explained below.

The respondent Katsoff, who was serving a sentence of one to three years in prison following his conviction for possession of a dangerous weapon, also elected to participate in New York's conditional release program. Disciplinary charges were brought against him for making derogatory comments about prison officials in his diary. As punishment, the deputy warden deprived him of 30

good conduct time for these diary entries and confined him in segregation for 57 days. Katzoff ultimately lost 50 days good behavior time credits—30 days directly and 20 additional days because he was unable to earn any good conduct time while in segregation. He brought a civil rights complaint under § 1983, joined with a petition for habeas corpus, in a federal district court, alleging that the prison officials had acted unconstitutionally.

The District Court held, in an unreported opinion, that Katzoff's failure to exhaust state remedies was no bar to his suit, since it was a civil rights action and the petition for a writ of habeas corpus was only an incidental request to assure enforcement of the judgment. On the merits, the District Court found that there was no prison regulation against the keeping of a diary; that punishment for entries in a private diary violated Katzoff's constitutional rights to due process, equal protection, and freedom of thought; and that confining Katzoff in segregation for this offense constituted cruel and unusual punishment. The Court therefore ordered that the 50 days good behavior time credits be restored to Katzoff, and since this restoration entitled him to immediate release on parole, the Court ordered such release.

The Court of Appeals reversed by a divided vote. Without reaching the merits of Katzoff's complaint, the appellate court held that his action was in essence an application for habeas corpus since it sought and obtained his immediate release from custody, and that therefore his complaint should have been dismissed because Katzoff had sought no relief whatever in the state courts and had made no showing that an adequate state remedy was unavailable. 441 F. 2d 558 (1971). This judgment of the Court of Appeals was subsequently set aside, and the case was reheard *en banc*, as explained below.

The respondent Kritsky's case is similar. While serving a prison sentence of 15 to 18 years under a state

court conviction for armed robbery, he was charged by prison officials with being a leader in a prison-wide protest demonstration and with advocating insurrection during that demonstration. When brought before the warden and asked how he would plead, Kritsky stated "Not guilty." The warden then immediately and summarily imposed punishment on him—deprivation of 545 days good conduct time credits, and confinement in segregation for four and one-half months, where he lost another 45 days good time.

Kritsky subsequently filed a civil rights action, combined with a petition for habeas corpus, in a federal district court, alleging that his summary punishment had deprived him of his good time credits without due process of law. The District Court found Kritsky's complaint to be a proper civil rights action, and went on to rule that he had been denied due process by the imposition of summary punishment and by the failure of the Prison Commutation Board to file with the Commissioner written reasons for cancellation of Kritsky's good time credits, as required by New York law. 313 F. Supp. 1247 (1970). Accordingly, the court ordered restoration of the 590 days good conduct time credits, which entitled Kritsky to immediate release on parole.

An appeal was argued before a panel of the Court of Appeals; but, before decision, that Court ordered the case to be reheard *en banc*, together with the *Rodriguez* and *Katzoff* cases. After rehearing *en banc* of the three now consolidated cases, the Court of Appeals, with three dissents, affirmed the judgments of the District Court in all of the cases "upon consideration of the merits and upon the authority of *Wilwording v. Swenson*, [404 U. S. 249] decided by the Supreme Court of the United States on December 14, 1971." 456 F. 2d 79, 80 (1972). Although eight judges wrote separate opinions, it is clear that the

majority of the Court relied primarily on our opinion in the *Wilwording* case, holding that complaints of state prisoners relating to the conditions of their confinement were cognizable either in federal habeas corpus or under the Civil Rights Act, and that as civil rights actions they were not subject to any requirement of exhaustion of state remedies.

We granted certiorari, 407 U. S. 919, in order to consider the bearing of the *Wilwording* decision upon the situation before us—where state prisoners have challenged the actual duration of their confinement on the ground that they have been unconstitutionally deprived of good conduct time credits, and where restoration of those credits would result in their immediate release from prison or in shortening the length of their confinement. In that context, the question whether a state prisoner may bring an action for equitable relief pursuant to § 1983, or whether he is limited to the specific remedy of habeas corpus, presents an unresolved and important problem in the administration of federal justice.

The problem involves the interrelationship of two important federal laws. The relevant habeas corpus statutes are 28 U. S. C. §§ 2241 and 2254. Section 2241 (a)(3) provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . . ." Section 2254 provides in pertinent part:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."[1]

The Civil Rights Act, 42 U. S. C. § 1983, provides:

"Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

It is clear not only from the language of § 2241 (c)(3) and § 2254 (a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody. By the end of the 16th century, there were in England several forms of habeas corpus, of which the most important and the only one with which we are here concerned was *habeas corpus ad subjiciendum*—the writ used to "inquir[e] into illegal

[1] See also 28 U. S. C. § 2243, quoted in n. 10, *infra*.

detention with a view to an order releasing the petitioner." *Fay* v. *Noia*, 372 U. S. 391, 399 n. 5.[2] Whether the petitioner had been placed in physical confinement by executive direction alone,[3] or by order of a court,[4] or even by private parties,[5] habeas corpus was the proper means of challenging that confinement and seeking release. Indeed, in 1670, the Chief Justice of England was able to say, in ordering the immediate discharge of a juror who had been jailed by a trial judge for bringing in a verdict of not guilty, that "[t]he writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it." *Bushell's Case*, Vaughan, 135, 136, 124 Eng. Rep. 1006, 1007.

By the time the American colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement, whether judicially imposed or not, was thus an integral part of our common-law heritage. The writ was given explicit recognition in the Suspension Clause of the Constitution, Art. I, § 9,

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[2] Other forms of habeas corpus include *habeas corpus ad respondendum; ad satisfaciendum; ad prosequendum, testificandum, deliberandum;* and *ad faciendum et recipiendum*. See *Fay* v. *Noia*, *supra*, at 399 n. 5. But when the words "habeas corpus" are used alone, they have been considered a generic term understood to refer to the common law writ of *habeas corpus ad subjiciendum*, which was the form termed the "great writ." *Ex parte Bollman*, 4 Cranch. 75, 95 (1807).

[3] See, e. g., *Darnel's Case*, 3 How. St. Tr. 1–59 (K. B. 1627); Petition of Right, 3 Car. I, c. 1 (1628); Habeas Corpus Act, 16 Car. I, c. 10, §§ 3, 8 (1641). See also *Ex parte Wells*, 18 How. 307 (1856); *Ex parte Milligan*, 4 Wall. 2 (1866); *Parisi* v. *Davidson*, 405 U. S. 34 (1972).

[4] See, e. g., *Bushell's Case*, Vaughan, 135, 124 Eng. Rep. 1006, 6 How. St. Tr. 999 (1670); *Fay* v. *Noia*, *supra*.

[5] See, e. g., *Rex* v. *Clarkson*, 1 Strange 444, 93 Eng. Rep. 625 (K. B. 1721); *Ford* v. *Ford*, 371 U. S. 187 (1962).

cl. 2;* was incorporated in the first congressional grant of jurisdiction to the federal courts, Act of September 24, 1789, c. 20, § 14, 1 Stat. 81–82; and was early recognized by this Court as a "great constitutional privilege." *Ex parte Bollman*, 4 Cranch 75, 95 (1805). See *Fay* v. *Noia*, *supra*, at 399–415.

The original view of a habeas corpus attack upon detention under a judicial order was a limited one. The relevant inquiry was confined to determining simply whether or not the committing court had been possessed of jurisdiction. *E. g., Ex parte Kearney*, 7 Wheat. 38 (1822); *Ex parte Watkins*, 3 Pet. 193 (1830). But over the years the writ of habeas corpus evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law, even though imposed pursuant to conviction by a court of competent jurisdiction. See *Ex parte Lange*, 18 Wall. 163 (1873); *Ex parte Siebold*, 100 U. S. 371 (1879); *Ex parte Wilson*, 114 U. S. 417 (1885); *Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938); and *Waley* v. *Johnston*, 316 U. S. 101 (1942). See also *Fay* v. *Noia*, *supra*, at 405–409, and cases cited at 409 n. 17. Thus, whether the petitioner's challenge to his custody is that the statute under which he stands convicted is unconstitutional, as in *Ex parte Siebold*, *supra*; that he has been imprisoned prior to trial on account of a defective indictment against him, as in *Ex parte Royall*, 117 U. S. 241 (1886); that he is unlawfully confined in the wrong institution, as in *In re Bonner*, 151 U. S. 242 (1894), and *Humphrey* v. *Cady*, 405 U. S. 504 (1972); that he was denied his constitutional rights at trial, as in *Johnson* v. *Zerbst*, *supra*; that his guilty plea was invalid, as in *Von Moltke* v. *Gillies*, 332 U. S. 708 (1948);

* "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."

that he is being unlawfully detained by the Executive or the military, as in *Parisi* v. *Davidson*, 405 U. S. 34 (1972); or that his parole was unlawfully revoked causing him to be reincarcerated in prison, as in *Morrissey* v. *Brewer*, 408 U. S. 471 (1972)—in each case his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement.[7]

In the case before us, the respondents' suits in the District Court fell squarely within this traditional scope of habeas corpus. They alleged that the deprivation of their good conduct time credits was causing or would cause them to be in illegal physical confinement, *i. e.*, that once their conditional release date had passed, any further detention of them in prison was unlawful; and they sought restoration of those good time credits, which, by the time the District Court ruled on their petitions, meant their immediate release from physical custody. Even if the restoration of the respondents' credits would not have resulted in their immediate release, but only in shortening the length of their actual confinement in prison, habeas corpus would have been their appro-

[7] It was not until quite recently that habeas corpus was made available to challenge less obvious restraints. In 1963, the Court held that a prisoner released on parole from immediate physical confinement was nonetheless sufficiently restrained in his freedom as to be in custody for purposes of federal habeas corpus. *Jones* v. *Cunningham*, 371 U. S. 236. In *Carafas* v. *LaVallee*, 391 U. S. 234 (1968), the Court for the first time decided that once habeas corpus jurisdiction has attached, it is not defeated by the subsequent release of the prisoner. And just this Term, in *Hensley* v. *Municipal Court*, — U. S. — (1973), we held that a person, who, after conviction, is released on bail or on his own recognizance, is "in custody" within the meaning of the federal habeas corpus statute. But those cases marked no more than a logical extension of the traditional meaning and purpose of habeas corpus—to effect release from illegal custody.

priate remedy. For recent cases have established that habeas corpus relief is not limited to immediate release from illegal custody, but that the writ is available as well to attack future confinement and obtain future releases. In *Peyton* v. *Rowe*, 391 U. S. 54 (1968), the Court held that a prisoner may attack on habeas the second of two consecutive sentences while still serving the first. The Court pointed out that the federal habeas corpus statute "does not deny the federal courts power to fashion appropriate relief other than immediate release. Since 1874, the habeas corpus statute has directed the courts to determine the facts and dispose of the case summarily, 'as law and justice require.' Rev. Stat. § 761 (1874), superseded by 28 U. S. C. § 2243." *Id.*, at 54. See also *Walker* v. *Wainwright*, 390 U. S. 335 (1968); *Carafas* v. *LaVallee*, 391 U. S. 234, 239 (1968); *Braden* v. *30th Judicial Circuit Court of Kentucky*, — U. S. — (1973). So even if restoration of respondents' good time credits had merely shortened the length of their confinement, rather than required immediate discharge from that confinement, their suits would still have been within the core of habeas corpus in attacking the very duration of their physical confinement itself. It is beyond doubt, then, that the respondents could have sought and obtained fully effective relief through federal habeas corpus proceedings.[8]

[8] Our brothers in dissent state that the respondents' claims "could not, in all likelihood, have been heard on habeas corpus at the time the present habeas corpus statute was enacted in 1867, or at the time the exhaustion doctrine was first announced in *Ex parte Royall*, 117 U. S. 241 (1886), or at the time the requirement was codified in 1948 . . ." *Post*, at 12–14. (Footnotes omitted.) This statement is apparently based on the assumption that, in those years, the respondents' habeas actions would have been barred by the "prematurity" doctrine, which precluded habeas relief that would have merely reduced the length of the prisoner's confinement rather than resulting in his immediate release, and which was not rejected until 1968, *Peyton* v. *Rowe*, 391 U. S. 54. We note, however, that the

Although conceding that they could have proceeded by way of habeas corpus, the respondents argue that the Court of Appeals was correct in holding that they were nonetheless entitled to bring their suits under § 1983 so as to avoid the necessity of first seeking relief in a state forum. Pointing to the broad language of § 1983,[9] they argue that since their complaints plainly came within the literal terms of that statute, there is no justifiable reason to exclude them from the broad remedial protection provided by that law. According to the respondents, state prisoners seeking relief under the Civil Rights Act should be treated no differently from any other civil rights plaintiffs, when the language of the Act clearly covers their causes of action.

The broad language of § 1983, however, is not conclusive of the issue before us. The statute is a general one, and, despite the literal applicability of its terms, the question remains whether the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation like this where it so clearly applies. The respondents' counsel acknowledged at oral argument that a state prisoner challenging his underlying

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respondent Katsoff initiated his action more than a month after his alleged release date, and thus his claim, if accepted, entitled him to immediate release even as of the date on which he brought suit. Although Rodrigues initiated his action 15 days before his alleged release date, and Kritsky six months before such date, in both cases those dates had long passed at the time of the District Court's decisions, and these respondents were thus entitled to immediate release at that time. In any event, the nature of the respondents' suits was an attack on the legality of their physical confinement itself; and to deal with such attacks on physical custody, however, imposed and whether or not related to conviction by a court, is the long-established function of habeas corpus. See pp. 8–11, *supra*.

[9] See p. 8, *supra*.

conviction and sentence on federal constitutional grounds in a federal court is limited to habeas corpus. It was conceded that he cannot bring a § 1983 action, even though the literal terms of § 1983 might seem to cover such a challenge, because Congress has passed a more specific act to cover that situation, and, in doing so, has provided that a state prisoner challenging his conviction must first seek relief in a state forum, if a state remedy is available. It is clear to us that the result must be the same in the case of a state prisoner's challenge to the fact or duration of his confinement, based, as here, upon the alleged unconstitutionality of state administrative action. Such a challenge is just as close to the core of habeas corpus as an attack on the prisoner's conviction, for it goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration.

In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.

The policy reasons underlying the habeas corpus statute support this conclusion. The respondents concede that the reason why only habeas corpus can be used to challenge a state prisoner's underlying conviction is the strong policy requiring exhaustion of state remedies in that situation—to avoid the unnecessary friction between the federal and state court systems that would result if

a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors. *Fay* v. *Noia*, *supra*, at 419–420. But they argue that this concern applies only to federal interference with state court convictions; and to support this argument, they quote from *Ex parte Royall*, *supra*, the case that first mandated exhaustion of state remedies as a precondition to federal habeas corpus:

> "The injunction to hear the case summarily and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, *between the judicial tribunals of the Union and of the States*, and in recognition of the fact that the public good requires that those relations be not disturbed by *unnecessary conflict between courts* equally bound to guard and protect rights secured by the Constitution." 117 U. S., at 251 (emphasis added).

In the respondents' view, the whole purpose of the exhaustion requirement, now codified in § 2254 (b), is to give state *courts* the first chance at remedying *their own* mistakes, and thereby to avoid "the unseemly spectacle of federal district courts trying the regularity of proceedings had in *courts* of coordinate jurisdiction." Parker, Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171, 172–173 (1948) (emphasis added). This policy, the respondents contend, does not apply when the challenge is not to the action of a state court, but, as here, to the action of a state administrative body. In that situation, they say, the concern with avoiding unnecessary interference by one court with the courts of another sovereignty with concurrent powers, and the importance of

giving state courts the first opportunity to correct constitutional errors made by them, do not apply, and hence the purpose of the exhaustion requirement of the habeas corpus statute is inapplicable.

We cannot agree. The respondents, we think, view the reasons for the exhaustion requirement of § 2254 (b) far too narrowly. The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity. That principle was defined in *Younger* v. *Harris*, 401 U. S. 37, 44 (1971), as "a proper respect for state functions," and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked. That comity considerations are not limited to challenges to the validity of state court convictions is evidenced by cases such as *Morrissey* v. *Brewer*, *supra*, where the petitioners' habeas challenge was to a state administrative decision to revoke their parole, and *Braden* v. *30th Judicial Circuit Court of Kentucky*, *supra*, where the petitioner's habeas attack was on the failure of state prosecutorial authorities to afford him a speedy trial.

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. Since these

internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances. In New York, for example, state judges sit on a regular basis at all but one of the State's correctional facilities, and thus inmates may present their grievances to a court at the place of their confinement, where the relevant records are available and where potential witnesses are located. The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons.[10]

[10] The dissent argues that the respondents' attacks on the actions of the prison administration here are no different, in terms of the potential for exacerbating federal-state relations, from the attacks made by the petitioners in *McNeese* v. *Board of Education*, 373 U. S. 668 (1963), *Damico* v. *California*, 389 U. S. 416 (1967), and *Monroe* v. *Pape*, 365 U. S. 167 (1961), on the various state administrative actions there. Thus, it is said, since exhaustion of state remedies was not required in those cases, it is anomalous to require it here. *Post*, at 22–23. The answer, of course, is that in those cases, brought pursuant to § 1983, no other, more specific federal statute was involved that might have reflected a different congressional intent. In the present case, however, the respondents' actions fell squarely within the traditional purpose of federal habeas corpus, and Congress has made the specific determination in § 2254 (b) that requiring the exhaustion of adequate state remedies in such cases will best serve the policies of federalism.

Requiring exhaustion in situations like that before us means, of course, that a prisoner's state remedy must be adequate and available, as indeed § 2254 (b) provides. The respondents in this case concede that New York provided them with an adequate remedy for the restoration of their good time credits, through § 79-c of the New York Civil Rights Act, which explicitly provides for injunctive relief to a state prisoner "for improper treatment where such treatment constitutes a violation of his constitutional rights."

But while conceding the availability in the New York courts of an opportunity for equitable relief, the respondents contend that confining state prisoners to federal habeas corpus, after first exhausting state remedies, could deprive those prisoners of any damage remedy to which they might be entitled for their mistreatment, since damages are not available in federal habeas corpus proceedings, and New York provides no damage remedy at all for state prisoners. In the respondents' view, if habeas corpus is the exclusive federal remedy for a state prisoner attacking his confinement, damages might never be obtained, at least where the State makes no provision for them. They argue that even if such a prisoner were to bring a subsequent federal civil rights action for damages, that action could be barred by principles of *res judicata* where the state courts had previously made an adverse determination of his underlying claim, even though a federal habeas court had later granted him relief on habeas corpus.

The answer to this contention is that the respondents here sought no damages, but only equitable relief—restoration of their good time credits—and our holding today is limited to that situation. If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or

more speedy release—the traditional purpose of habeas corpus. In the case of a damage claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, as the State itself concedes, a damage action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies. Cf. *Ray* v. *Fritz*, 468 F. 2d 586 (CA2 1972).

The respondents next argue that to require exhaustion of state remedies in a case such as the one at bar would deprive a state prisoner of the speedy review of his grievance which is so often essential to any effective redress. They contend that if, prior to bringing an application for federal habeas corpus, a prisoner must exhaust state administrative remedies and then state judicial remedies through all available appeals, a very significant period of time might elapse before the prisoner could ever get into federal court. By that time, no matter how swift and efficient federal habeas corpus relief might be, the prisoner might well have suffered irreparable injury and his grievances might no longer be remediable.

It is true that exhaustion of state remedies takes time. But there is no reason to assume that state prison administrators or state courts will not act expeditiously. Indeed, new regulations established by the New York Department of Corrections provide for administrative review of a prisoner's record in the institution shortly before the *earliest* possible release date, 7 N. Y. Code, Rules & Regulations, § 261.3 (b),[11] and state judges in New York actually sit in the institutions to hear pris-

[11] That section provides that each inmate's file "shall be considered not more than three nor less than two months before the earliest possible date he would be entitled to consideration for parole or conditional or other release if that date depends upon the amount of good behavior allowance to be granted based upon the assumption that he has earned all good behavior allowances that can be granted."

ones complaints. Moreover, once a state prisoner arrives in federal court with his petition for habeas corpus, the federal habeas statute provides for a swift, flexible, and summary determination of his claim. 28 U. S. C. § 2243.[13] See also *Harris* v. *Nelson*, 394 U. S. 286 (1969);

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[13] That section provides

"A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

"The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

"The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

"When the writ or order is returned a day shall be set for hearing not more than five days after the return unless for good cause additional time is allowed.

"Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

"The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

"The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

"The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

See also 28 U. S. C. § 2254 (e):

"If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination."

and *Hensley* v. *Municipal Court*, — U. S. —, — (1973). By contrast, the filing of a complaint pursuant to § 1983 in federal court initiates an original plenary civil action, governed by the full panoply of the Federal Rules of Civil Procedure. That such a proceeding, with its discovery rules and other procedural formalities, can take a significant amount of time, very frequently longer than a federal habeas corpus proceeding, is demonstrated by the respondents' actions in the present case. Although both Rodrigues and Kritsky initiated their actions before their conditional release dates, the District Court did not reach its decisions until three and 10 months later, respectively—in both cases well after the conditional release dates had passed. Only in Katzoff's case was there a speedy determination, and his action was not initiated until after his alleged release date.

In any event, the respondents' time argument would logically extend to a state prisoner who challenges the constitutionality of a conviction that carried a relatively short sentence; and yet such a prisoner is clearly covered by § 2254 (b). Arguably, in either case, if the prisoner could make out a showing that, because of the time factor, his otherwise adequate state remedy would be inadequate, a federal court might entertain his habeas corpus application immediately, under § 2254 (b)'s language relating to "the existence of circumstances rendering such [state] process ineffective to protect the rights of the prisoner." But we need not reach that issue here.

Principles of *res judicata* are, of course, not wholly applicable to habeas corpus proceedings. 28 U. S. C. § 2254 (d). See *Salinger* v. *Loisel*, 265 U. S. 224, 230 (1924). Hence, a state prisoner in the respondents' situation who has been denied relief in the state courts is not precluded from seeking habeas relief on the same claims in federal court. On the other hand, *res judicata* has been held to be fully applicable to a civil rights action brought under § 1983. *Coogan* v. *Cincinnati Bar*

Association, 431 F. 2d 1209, 1211 (CA5 1970); *Jenson* v. *Olson*, 353 F. 2d 825 (CA8 1965); *Rhodes* v. *Meyers*, 334 F. 2d 709, 710 (CA8 1964); *Goss* v. *Illinois*, 312 F. 2d 257 (CA7 1963). Accordingly, there would be an inevitable incentive for a state prisoner to proceed at once in federal court by way of a civil rights action, lest he lose his right to do so. This would have the unfortunate dual effect of denying the state prison administration and the state courts the opportunity to correct the errors committed in the State's own prisons, and of isolating those bodies from an understanding of and hospitality to the federal claims of state prisoners in situations such as that before us.[12] Federal habeas corpus, on the other hand, serves the important function of allowing the State to deal with these peculiarly local problems on its own, while preserving for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied redress.

The respondents place a great deal of reliance on our recent decisions upholding the right of state prisoners to bring federal civil rights actions to challenge the conditions of their confinement. *Cooper* v. *Pate*, 378 U. S. 546 (1964); *Houghton* v. *Shafer*, 392 U. S. 639 (1968); *Wilwording* v. *Swenson*, 404 U. S. 249 (1971); *Haines* v. *Kerner*, 404 U. S. 519 (1972). But none of the state prisoners in those cases was challenging the fact or duration of his physical confinement itself, and none was seek-

[12] This isolation, of course, will not occur if the prisoner is required to proceed by way of federal habeas corpus, with its exhaustion requirement. For "exhaustion preserves the role of the state courts in the application and enforcement of federal law. Early federal intervention in state . . . proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests." Note, Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038, 1094 (1970).

ing immediate or more speedy release from that confinement—the heart of habeas corpus. In *Cooper*, the prisoner alleged that, solely because of his religious beliefs, he had been denied permission to purchase certain religious publications and had been denied other privileges enjoyed by his fellow prisoners. In *Houghton*, the prisoner's contention was that prison authorities had violated the Constitution by confiscating legal materials which he had acquired for pursuing his appeal, but which, in violation of prison rules, had been found in the possession of another prisoner. In *Wilwording*, the prisoners' complaints related solely to their living conditions and disciplinary measures while confined in maximum security. And in *Haines*, the prisoner claimed that prison officials had acted unconstitutionally by placing him in solitary confinement as a disciplinary measure, and he sought damages for claimed physical injuries sustained while so segregated. It is clear, then, that in all those cases, the prisoners' claims related solely to the States' alleged unconstitutional treatment of them while in confinement. None sought, as did the respondents here, to challenge the very fact or duration of the confinement itself. Those cases, therefore, merely establish that a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody. Upon that understanding, we reaffirm those holdings. Cf. *Humphrey* v. *Cady*, 405 U. S. 504, 516–517 n. 18 (1972).[14]

[14] If a prisoner seeks to attack both the conditions of his confinement and the fact or length of that confinement, his latter claim, under our decision today, is cognizable only in federal habeas corpus, with its attendant requirement of exhaustion of state remedies. But, consistent with our prior decisions, that holding in no way precludes him from simultaneously litigating in federal court, under § 1983, his claim relating to the conditions of his confinement.

This is not to say that habeas corpus may not also be available to challenge such prison conditions. See *Johnson* v. *Avery*, 393 U. S. 483 (1969); *Wilwording* v. *Swenson*, *supra*, at 251. When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal. See Note, Developments in the Law—Habeas Corpus, 83 Harv. L. Rev. 1038, 1084 (1970).[13]

But we need not in this case explore the appropriate limits of habeas corpus as an alternative remedy to a proper action under § 1983. That question is not before us. What is involved here is the extent to which § 1983 is a permissible alternative to the traditional remedy of habeas corpus. Upon that question, we hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Accordingly, we reverse the judgment before us.

It is so ordered.

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[13] The parties disagree as to the original reason for the emergence of concurrent federal remedies in prison condition cases. According to the State, the parallel development reflects the fact that prior to the Court's decisions in *Jones* v. *Cunningham*, *supra*, *Carafas* v. *LaVallee*, *supra*, and *Johnson* v. *Avery*, *supra*, the limits of the concept of custody for purposes of habeas corpus were uncertain, and so the clearest remedy for prisoners challenging their conditions was through a civil rights action. The respondents take the converse position—that habeas corpus may originally have been made available for these challenges because there was no other remedy for in-prison abuses before the resurrection of § 1983 in *Monroe* v. *Pape*, *supra*, and the affirmation of its availability for prisoners in *Cooper* v. *Pate*, *supra*, and *Houghton* v. *Shafer*, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 71-1369

Peter Preiser, Commissioner of Correctional Services, et al., Petitioners, v. Eugene Rodrigues et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 7, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The question presented by this case is one that I, like the Court of Appeals, had thought already resolved by our decision last Term in *Wilwording* v. *Swenson*, 404 U. S. 249 (1971). We held there that the Ku Klux Act of 1871,[1] 42 U. S. C. § 1983; 28 U. S. C. § 1343 (3), confers jurisdiction on the United States District Courts to entertain a state prisoner's application for injunctive relief against allegedly unconstitutional conditions of confinement. See also *Humphrey* v. *Cady*, 405 U. S. 504, 516-517 n. 18 (1972); *Houghton* v. *Shafer*, 392 U. S. 639 (1968). At the same time, we held that "[t]he remedy provided by these Acts 'is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.' *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961); *McNeese* v. *Board of Education*, 373 U. S. 668 (1963); *Damico* v. *California*, 389 U. S. 416 (1967). State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." *Wilwording* v. *Swenson*, *supra*, at 251.

Inexplicably, the Court today eviscerates that proposition by drawing a distinction that is both analytically

[1] Act of April 20, 1871, c. 22, § 1, 17 Stat. 13, Rev. Stat. § 1979.

unsound and, I fear, unworkable in practice. The net effect of the distinction is to preclude respondents from maintaining these actions under § 1983, leaving a petition for writ of habeas corpus the only available federal remedy. As a result, respondents must exhaust state remedies before their claims can be heard in a federal district court. I remain committed to the principles set forth in *Wilwording* v. *Swenson*, and I therefore respectfully dissent.

Respondents are three New York state prisoners who were placed in segregation and deprived of good conduct time credits as a result of prison disciplinary proceedings.* Each of the respondents commenced a *pro se* action in the United States District Court for the Northern District of New York by filing a combined civil rights

*In his complaint, respondent Rodriguez alleged that correctional authorities had unlawfully cancelled four months and 14 days of good conduct time credits, "[w]ithout affording plaintiff notice of any charges or a fair hearing at which plaintiff would have the assistance of counsel and the opportunity to confront witnesses, present evidence on his own behalf, and a specification of the grounds and underlying facts upon which the [authorities'] determination was based." App., at 12a. And, further, that the cancellation was an act of harassment and persecution against him because of his failure to provide the authorities with certain information. *Id.*, at 12a.

Respondent Katsoff alleged that he was wrongfully placed in solitary confinement and deprived of good conduct time as punishment for certain entries he had made in his diary. According to an affidavit he filed in District Court, the entries in question included a reference to one prison official as "a cigar-smoking S. O. B.," and to another as a "creep." App., at 54a.

Respondent Krisky stated in his complaint that correctional authorities had deprived him of good time credits without notice of charges or a fair hearing, and as part of a "program of harassment and oppression directed at the plaintiff for having participated in a peaceful and non-violent work strike which ultimately culminated in legislation being passed . . . ." App., at 100a.

complaint and petition for habeas corpus. In each case the District Court concluded that since the action was properly brought under § 1983, the prisoner was not bound by the exhaustion of state remedies requirement of the federal habeas corpus statute.[1] On the merits of the three cases, the District Court held that state correctional authorities had deprived each respondent of rights guaranteed by the Fourteenth Amendment, and directed petitioner, the Commissioner of Correctional Services, to restore the good conduct time credits that each of the respondents had lost.

By divided vote, two separate panels of the United States Court of Appeals for the Second Circuit reversed the judgments of the District Court with respect to respondents Rodriguez and Katzoff. Prior to decision in the case of respondent Kritsky, the Court of Appeals vacated the two earlier decisions and set all three cases for rehearing *en banc*. By a vote of 9–3, the Court affirmed the judgments of the District Court "upon consideration of the merits and upon the authority of *Wilwording* v. *Swenson*," decided by this Court while rehearing *en banc* was pending in the Court of Appeals. 456 F. 2d 79, 80 (1972). Although several of the judges who concurred in the decision candidly stated their misgivings about our holding in *Wilwording*, they felt "constrained," nonetheless, "to concur in affirming the orders

[1] 28 U. S. C. § 2254 (b):

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

of the district court." 456 F. 2d, at 81 (Friendly, C. J., concurring).[4]

The Court's conclusion that *Wilwording* is not controlling is assertedly justified by invocation of a concept, newly invented by the Court today, variously termed the "core of habeas corpus," the "heart of habeas corpus," and the "essence of habeas corpus." *Ante*, at 8, 14, and 23. In the Court's view, an action lying at the "core of habeas corpus" is one that "goes directly to the constitutionality of [the prisoner's] physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration." *Id.*, at 14. With regard to such actions, habeas corpus is now considered the prisoner's exclusive remedy. In short, the Court does not graft the habeas corpus exhaustion requirement onto prisoner actions under the Ku Klux Act, but it reaches what is functionally the same result by holding that the District Court's jurisdiction under the Act is in some instances displaced by the habeas corpus remedy. Henceforth, in such cases a prisoner brings an action in the nature of habeas corpus—or he brings no federal court action at all.

At bottom, the Court's holding today rests on an understandable apprehension that the no-exhaustion rule of § 1983 might, in the absence of some limitation, devour the exhaustion rule of the habeas corpus statute. The problem arises because the two statutes necessarily overlap. Indeed, every application by a state prisoner for federal habeas corpus relief against his jailers could, as a matter of logic and semantics, be viewed as an action

[4] Indeed, Chief Judge Friendly suggested that the "proper course for the *in banc* court [would be] to affirm the orders of the district court without writing opinions." 456 F. 2d, at 80. Judge Kaufman, who expressed no misgivings about our holding in *Wilwording v. Swenson*, *supra*, indicated in his concurring opinion that he too thought the judgments of the District Court should have been summarily affirmed. *Id.*, at 82.

under the Ku Klux Act to obtain injunctive relief against "the deprivation," by one acting under color of state law, "of any rights, privileges or immunities secured by the Constitution and laws" of the United States. 42 U. S. C. § 1983. To prevent state prisoners from nullifying the habeas corpus exhaustion requirement by invariably styling their petitions as pleas for relief under § 1983, the Court today devises an ungainly and irrational scheme that permits some prisoners to sue under § 1983, while others may proceed only by way of petition for habeas corpus. And the entire scheme operates in defiance of the purposes underlying both the exhaustion requirement of habeas corpus and the absence of a comparable requirement under § 1983.

I

At the outset, it is important to consider the nature of the line that the Court has drawn. The Court holds today that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus." *Ante*, at 24. But even under the Court's approach, there are undoubtedly some instances where a prisoner has the option of proceeding either by petition for habeas corpus or by suit under § 1983.

In *Johnson* v. *Avery*, 393 U. S. 483 (1969), we held that the writ of habeas corpus could be used to challenge allegedly unconstitutional conditions of confinement. Cf. *Ex parte Hull*, 312 U. S. 546, 549 (1941). And in *Wilwording* v. *Swenson*, *supra*, where the petitioners challenged "only their living conditions and disciplinary measures while confined in maximum security at Missouri State Penitentiary," *id.*, at 249, we held explicitly that their claims were cognizable in habeas corpus.

These holdings illustrate the general proposition that "[a]ny unlawful restraint of personal liberty may be inquired into on habeas corpus. . . . This rule applies although a person is in lawful custody. His conviction and incarceration deprive him only of such liberties as the law has ordained he shall suffer for his transgressions." *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (CA6 1944); cf. *In re Bonner*, 151 U. S. 242 (1894).[4]

Yet even though a prisoner may challenge the conditions of his confinement by petition for writ of habeas corpus, he is not precluded by today's opinion from raising the same or similar claim, without exhaustion of state remedies, by suit under the Ku Klux Act, provided he attacks only the conditions of his confinement and not its fact or duration. To that extent, at least, the Court leaves unimpaired our holdings in *Wilwording* v. *Swenson*, *supra*, and the other cases in which we have upheld the right of prisoners to sue their jailers under § 1983 without exhaustion of state remedies.[5] *Humphrey* v. *Cady*, 405 U. S. 504, 516–517 n. 18 (1972); *Houghton* v. *Shafer*, 392 U. S. 639 (1968).[6] Nor do I read today's opinion as rejecting, or even questioning, the rationale

[4] See Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1079–1087 (1970).

[5] Indeed, the Court expressly views our prior cases as establishing "that a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody. Upon that understanding, we reaffirm those holdings." *Ante*, at 23.

[6] In addition to the cases cited in text, in which we explicitly indicated that a prisoner might proceed under § 1983 without exhausting state remedies, we have also repeatedly upheld a prisoner's right to challenge the conditions of his confinement under § 1983, without any suggestion that exhaustion of state remedies is a necessary precondition to the bringing of the suit. See *Haines* v. *Kerner*, 404 U. S. 519 (1972); *Cruz* v. *Beto*, 405 U. S. 319 (1972); *Younger* v. *Gilmore*, 404 U. S. 15 (1971); *Cruz* v. *Hauck*, 404 U. S. 59 (1971);

[illegible] lower court decisions authorizing challenges to prison conditions by suit under § 1983.[4] Accordingly, we can only conclude that some instances remain where habeas corpus provides a supplementary but not an exclusive remedy—or, to put it another way, where an action may properly be brought in habeas corpus, even though it is somehow sufficiently distant from the "core of habeas corpus" so avoid displacing concurrent jurisdiction under the Ku Klux Act. In such a case, a state prisoner retains the option of foregoing the habeas corpus remedy in favor of suit under § 1983.

II

Putting momentarily to one side the grave analytic shortcomings of the Court's approach, it seems clear that the scheme's unmanageability is sufficient reason to condemn it. For the unfortunate but inevitable legacy of today's opinion is a perplexing set of uncertainties and anomalies. And the nub of the problem is the definition of the Court's new-found and essentially ethereal concept, the "core of habeas corpus."[5]

McDonald v. *Board of Elections*, 394 U. S. 802 (1969); *Lee* v. *Washington*, 390 U. S. 333 (1968); *Cooper* v. *Pate*, 378 U. S. 546 (1964).

[4] See, *e. g.*, *Sostre* v. *McGinnis*, 442 F. 2d 178, 182 (CA2 1971) (conditions of segregated confinement); *Jackson* v. *Bishop*, 404 F. 2d 571 (CA8 1968) (cruel and unusual punishment); *Hirons* v. *Director*, 351 F. 2d 613 (CA4 1965) (medical treatment); *Pierce* v. *LaVallee*, 293 F. 2d 233 (CA2 1961) (religious freedom); *Edwards* v. *Schmidt*, 321 F. Supp. 68 (WD Wis. 1971) (transfer of juveniles to adult facility); *Hancock* v. *Avery*, 301 F. Supp. 786 (MD Tenn. 1969) (solitary confinement).

[5] Indeed, one must inevitably wonder whether the "core" of habeas corpus will not prove as intractable to definition as the "core" of another concept that some of us have struggled to define. Cf. *Jacobellis* v. *Ohio*, 378 U. S. 184, 197 (1964) (STEWART, J., concurring).

A prisoner is unlucky enough to have his action fall within the core of habeas corpus whenever he challenges the fact or duration of his confinement. For example, an attack on the validity of conviction or sentence is plainly directed at the fact or duration of confinement, and the prisoner can therefore proceed only by petition for habeas corpus. Similarly, where prisoners allege, as here, that "the deprivation of their good conduct time credits [is] causing or [will] cause them to be in illegal physical confinement, *i. e.*, that once their conditional release date [has] passed, any further detention of them in prison [will be] unlawful," their claim falls within the core. And "[e]ven if the restoration of the respondent's credits would not have resulted in their immediate release, but only in shortening the length of their actual confinement in prison," jurisdiction under § 1983 is displaced by the habeas corpus remedy. *Ante*, at 11.

At the opposite end of the spectrum from an attack on the conviction itself or on the deprivation of good time credits is a prisoner's action for monetary damages against his jailers. "If a state prisoner is seeking damages," the Court makes clear, he is seeking "something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damage claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, as the State itself concedes, a damage action by a state prisoner could be brought under [§ 1983] in federal court without any requirement of prior exhaustion of state remedies." *Ante*, at 18–19 (emphasis in original).

Between a suit for damages and an attack on the conviction itself or on the deprivation of good time credits are cases where habeas corpus is an appropriate and available remedy, but where the action falls outside the "core of habeas corpus" because the attack is directed at

conditions of confinement, not at its fact or dura-
Notwithstanding today's decision, a prisoner may
challenge, by suit under § 1983, prison living conditions
and disciplinary measures,[10] or confiscation of legal ma-
terials,[11] or impairment of the right to free exercise of
religion,[12] even though federal habeas corpus is available
as an alternative remedy. It should be plain enough
that serious difficulties will arise whenever a prisoner
seeks to attack in a single proceeding both the conditions
of his confinement and the deprivation of good time
credits. And the addition of a plea for monetary dam-
ages exacerbates the problem.

If a prisoner's sole claim is that he was placed in soli-
tary confinement pursuant to an unconstitutional disci-
plinary procedure,[13] he can obtain federal injunctive relief
and monetary damages in an action under § 1983. The
unanswered question is whether he loses the right to
proceed under § 1983 if, as punishment for his alleged
misconduct, his jailers have not only subjected him to
unlawful segregation and thereby inflicted an injury that
is compensable in damages, but have compounded the
wrong by improperly depriving him of good time credits.
Three different approaches are possible.

First, we might conclude that jurisdiction under § 1983
is lost whenever good time credits are involved, even
where the action is based primarily on the need for
monetary relief or an injunction against continued segre-
gation. If that is the logic of the Court's opinion, then
the scheme creates an undeniable, and in all likelihood
irresistible, incentive for state prison officials to defeat
the jurisdiction of the federal courts by adding the
deprivation of good time credits to whatever other pun-

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[10] E. g., *Wilwording* v. *Swenson*, 404 U. S. 249 (1971).
[11] E. g., *Houghton* v. *Shafer*, 392 U. S. 639 (1968).
[12] E. g., *Cooper* v. *Pate*, 378 U. S. 546 (1964).
[13] E. g., *Haines* v. *Kerner*, 405 U. S. 519 (1972).

ishment is imposed. And if all of the federal claims must be held in abeyance pending exhaustion of state remedies, a prisoner's subsequent effort to assert a damages claim under § 1983 might arguably be barred by principles of res judicata.[14] To avoid the loss of his damages claim, a prisoner might conclude that he should make no mention of the good time issue and instead seek only damages in a § 1983 action. That approach (assuming it would not be disallowed as a subterfuge to circumvent the exhaustion requirement) creates its own distressing possibilities. For having obtained decision in federal court on the issue of damages, the prisoner would presumably be required to repair to state court in search of his lost good time credits, returning once again to federal court if his state court efforts should prove unavailing.

Moreover, a determination that no federal claim can be raised where good time credits are at stake would give rise to a further anomaly. If the prisoner is confined in an institution that does not offer good time credits, and therefore cannot withdraw them,[15] his prison conditions claims could always be raised in a suit under § 1983. On the other hand, an inmate in an institution that uses good time credits as reward and punish-

[14] That assumes, of course, that a damages claim cannot be raised on habeas corpus, *ante*, at 19, and that the special res judicata rules of habeas corpus would not apply. In any case, we have never held that the doctrine of res judicata applies, in whole or in part, to bar the relitigation under § 1983 of questions that might have been raised, but were not, or that were raised and considered in state court proceedings. The Court correctly notes that a number of lower courts have assumed that the doctrine of res judicata is fully applicable to cases brought under § 1983. But in view of the purposes underlying enactment of the Act—in particular, the congressional misgivings about the ability and inclination of state courts to enforce federally protected rights, see *post*, at 16–19—that conclusion may well be in error.

[15] Brief for Respondents, at 25, citing N. Y. Pen. L. § 75.00 and N. Y. Corr. L. §§ 803, 804 (reformatory sentenced prisoners).

...ner, who seeks a federal hearing on the identical legal and factual claims, would normally be required to exhaust state remedies and then proceed by way of federal habeas corpus. The rationality of that difference in treatment is certainly obscure. Yet that is the price of permitting the availability of a federal forum to be controlled by the happenstance (or stratagem) that good time credits are at stake.

As an alternative, we might reject outright the premises of the first approach and conclude that a plea for money damages or for an injunction against continued segregation is sufficient to bring all related claims, including the question of good time credits, under the umbrella of § 1983. That approach would, of course, simplify matters considerably. And it would make unnecessary the fractionation of the prisoner's claims into a number of different issues to be resolved in duplicative proceedings in state and federal courts. Nevertheless, the approach would seem to afford a convenient means of sidestepping the basic thrust of the Court's opinion, and we could surely expect state prisoners routinely to add to their other claims a plea for monetary relief. So long as the prisoner could formulate at least a colorable damages claim, he would be entitled to litigate all issues in federal court without first exhausting state remedies.

In any event, the Court today rejects, perhaps for the reasons suggested above, both of the foregoing positions. Instead, it holds that insofar as a prisoner's claim relates to good time credits, he is required to exhaust state remedies; but he is not precluded from simultaneously litigating in federal court, under § 1983, his claim for monetary damages or an injunction against continued segregation. *Ante*, at 23 n. 14. Under that approach, state correctional authorities have no added incentive to withdraw good time credits, since that action cannot, standing alone, keep the prisoner out of federal court. But, at the same time, it does not encourage a prisoner

to assert an unnecessary claim for damages or injunctive relief as a means of bringing his good time claim under the purview of § 1983. Nevertheless, this approach entails substantial difficulties—perhaps the greatest difficulties of the three. In the first place, its extreme inefficiency is readily apparent. For in many instances a prisoner's claims will be under simultaneous consideration in two distinct forums, even though the identical legal and factual questions are involved in both proceedings. Thus, if a prisoner's punishment for some alleged misconduct is both a term in solitary and the deprivation of good time credits, and if he believes that the punishment was imposed pursuant to unconstitutional disciplinary procedures, he can now litigate the legality of those procedures simultaneously in state court (where he seeks restoration of good time credits) and in federal court (where he seeks damages or an injunction against continued segregation). Moreover, if the federal court is the first to reach decision, and if that court concludes that the procedures are, in fact, unlawful, then the entire state proceeding must be immediately aborted, even though the state court may have devoted substantial time and effort to its consideration of the case. By the same token, if traditional principles of res judicata are applicable to suits under § 1983, see *ante*, at n. 14, the prior conclusion of the state court suit would effectively set at naught the entire federal court proceeding. This is plainly a curious prescription for improving relations between state and federal courts.

Since some of the ramifications of this new approach are still unclear, the unfortunate outcome of today's decision—an outcome that might not be immediately surmised from the seeming simplicity of the basic concept, the "core of habeas corpus"—is almost certain to be the further complication of prison conditions litigation. In itself that is disquieting enough. But it

is especially distressing that the remaining questions will have to be resolved on the basis of pleadings, whether in habeas corpus or suit under § 1983, submitted by state prisoners, who will often have to cope with these questions without even minimal assistance of counsel.

III

The Court's conclusion that respondents must proceed by petition for habeas corpus is unfortunate, not only because of the uncertainties and practical difficulties to which the conclusion necessarily gives rise, but also because it derives from a faulty analytic foundation. The text of § 1983 carries no explanation for today's decision; prisoners are still, I assume, "persons" within the meaning of the statute. Moreover, prior to our recent decisions expanding the definition of "custody," [16] and abandoning the "prematurity" doctrine,[17] it is doubtful that habeas corpus would even have provided them a remedy. Since their claims could not, in all likelihood, have been heard on habeas corpus at the time the present habeas corpus statute was enacted in 1867,[18] or at the time the exhaustion doctrine was first announced in *Ex*

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[16] See, e. g., *Hensley* v. *Municipal Court*, — U. S. — (1973); *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); *Jones* v. *Cunningham*, 371 U. S. 236 (1963). These decisions have established habeas corpus as an available and appropriate remedy in situations where the petitioner's challenge is not merely to the fact of his confinement.

[17] See *Peyton* v. *Rowe*, 391 U. S. 54 (1968), overruling *McNally* v. *Hill*, 293 U. S. 131 (1934). Under the prematurity doctrine, a prisoner could not have attacked the deprivation of good conduct time credits where restoration of the credits would shorten the length of his confinement but not bring it immediately to an end.

[18] Act of Feb. 5, 1867, c. 28, § 1, 14 Stat. 385, 28 U. S. C. § 2241 (c)(3). Prior to that enactment, the writ was made available to special categories of state prisoners. Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1048 n. 46 (1970).

parte Royall, 117 U. S. 241 (1886), or at the time the requirement was codified in 1948,[19] it is surely hard to view these acts as a determination to preclude suit under § 1983 and leave habeas corpus the prisoner's only remedy. Nevertheless, to prevent state prisoners from invoking the jurisdictional grant of § 1983 as a means of circumventing the exhaustion requirement of the habeas corpus statute, the Court finds it necessary to hold today that in this one instance jurisdiction under § 1983 is displaced by the habeas corpus remedy.

The concern that § 1983 not be used to nullify the habeas corpus exhaustion doctrine is, of course, legitimate. But our effort to preserve the integrity of the doctrine must rest on an understanding of the purposes that underlie it. In my view, the Court misapprehends these fundamental purposes and compounds the problem by paying insufficient attention to the reasons why exhaustion of state remedies is not required in suits under § 1983. As a result, the Court mistakenly concludes that allowing suit under § 1983 would jeopardize the purposes of the exhaustion rule.

By enactment of the Ku Klux Act in 1871, and again by the grant in 1875 of original federal question jurisdiction to the United States District Courts,[20] Congress recognized important interests in permitting a plaintiff to choose a federal forum in cases arising under federal law. "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal

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[19] Act of June 25, 1948, c. 646, 62 Stat. 967, 28 U. S. C. § 2254 (b)–(c). It is universally agreed that the purpose of the 1948 enactment was to codify the doctrine as formulated in *Ex parte Hawk*, 321 U. S. 114 (1944), and other decisions of this Court.

[20] Act of March 3, 1875, § 1, 18 Stat. 470, 28 U. S. C. § 1331.

constitutional claims. Plainly, escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts, '. . . to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . .' *Robb* v. *Connolly*, 111 U. S. 624, 637." *Zwickler* v. *Koota*, 389 U. S. 241, 248 (1967).

This grant of jurisdiction was designed to preserve and enhance the expertise of federal courts in applying federal law; to achieve greater uniformity of results, cf. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 347–348 (1816); and, since federal courts are "more likely to apply federal law sympathetically and understandingly than are state courts," ALI, Study of the Division of Jurisdiction Between State and Federal Courts 166 (1969), to minimize misapplications of federal law. See generally *id.*, at 165–167.

In the service of the same interests, we have taken care to emphasize that there are

> "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred special categories of jurisdiction upon the federal courts, and with the principle that 'When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.' *Willcox* v. *Consolidated Gas*

Co., 212 U. S. 19, 40." *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 415 (1964).

We have also recognized that review by this Court of state decisions, "even when available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts." *Id.*, at 416. The federal courts are, in short, the "primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States." Frankfurter & Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65 (1927). See *England* v. *Louisiana State Board of Medical Examiners*, *supra*, at 415.

These considerations, applicable generally in cases arising under federal law, have special force in the context of the Ku Klux Act of 1871. In a suit to enforce fundamental constitutional rights, the plaintiff's choice of a federal forum has singular urgency.[11] The statutory predecessor to § 1983 was, after all, designed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961). And the statute's legislative history

"makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protec-

[11] See generally Chevigny, Section 1983 Jurisdiction: A Reply, 83 Harv. L. Rev. 1352, 1356–1358 (1970).

tion of federally created rights; it was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' *Ex parte Virginia* [100 U. S. 339, 346 (1879)]." *Mitchum* v. *Foster*, 407 U. S. 225, 242 (1972).

See also *District of Columbia* v. *Carter*, — U. S. —, — (1973)."

It is against this background that we have refused to require exhaustion of state remedies by civil rights plaintiffs." Plainly, "[w]e would defeat [the purposes

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"See, e. g., remarks of Rep. Coburn:

"The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily." Cong. Globe, 42d Cong., 1st Sess., 460 (1871).

And the remarks of Sen. Pratt:

". . . of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux Klan organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then justice closes the door of her temples." Cong. Globe, 42d Cong., 1st Sess., 505 (1871).

"See, e. g., *Wilwording* v. *Swenson*, *supra*; *King* v. *Smith*, 392 U. S. 309, 312 n. 4 (1968). *Monroe* v. *Pape*, *supra*; *Bacon* v. *Rutland R. Co.*, 232 U. S. 134 (1914); cf. Note, Exhaustion of

of § 1983] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court." *McNeese* v. *Board of Education*, 373 U. S. 668, 672 (1963). "We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum." *Stapleton* v. *Mitchell*, 60 F. Supp. 51, 55 (1945); quoted with approval in *Zwickler* v. *Koota*, *supra*, at 248; and *McNeese* v. *Board of Education*, *supra*, at 674 n. 6. See also *Monroe* v. *Pape*, *supra*, at 183; *Moreno* v. *Henckel*, 431 F. 2d 1299, 1306–1307 (CA5 1970); Friendly, Federal Jurisdiction: A General View 102–103 (1973).

Our determination that principles of federalism do not require the exhaustion of state remedies in cases brought under the Ku Klux Act holds true even where the state agency or process under constitutional attack is intimately tied to the state judicial machinery. Cf. *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972). Indeed, only last Term we held in *Mitchum* v. *Foster*, *supra*, that § 1983 operates as an exception to the federal anti-injunction statute, 28 U. S. C. § 2283, which prohibits federal court injunctions against ongoing state judicial proceedings and which is designed to prevent "needless friction between state and federal courts." *Oklahoma Packing Co.* v. *Gas Co.*, 309 U. S. 4, 9 (1940). Although the anti-injunction statute rests in part on considerations as fundamental as the "constitutional independence of the States and their courts," *Atlantic C. L. R. Co.* v. *Brotherhood of Locomotive En-*

State Remedies Under the Civil Rights Act, 68 Colum. L. Rev. 1201 (1968).

[illegible], 398 U. S. 281, 287 (1970), and although exceptions will "not be enlarged by loose statutory construction," *ibid.*, we nevertheless unanimously concluded that [illegible] is excepted from the statute's prohibition—that the anti-injunction statute does not, in other words, displace federal jurisdiction under the Ku Klux Act.

In sum, the absence of an exhaustion requirement in [illegible] is not an accident of history or the result of careless oversight by Congress or this Court. On the contrary, the no-exhaustion rule is an integral feature of the statutory scheme. Exhaustion of state remedies is not required precisely because such a requirement would frustrate the purposes of the Act. For that reason, the imposition of such a requirement, even if done indirectly by means of a determination that jurisdiction under § 1983 is displaced by an alternative remedial device, must be justified by a clear statement of congressional intent, or, at the very least, by the presence of the most persuasive considerations of policy. In my view, no such justification can be found.

Crucial to the Court's analysis of the case before us is its understanding of the purposes that underlie the habeas corpus exhaustion requirement. But just as the Court pays too little attention to the reasons for a no-exhaustion rule in actions under § 1983, it also misconceives the purposes of the exhaustion requirement in habeas corpus. As a result, the Court reaches what seems to me the erroneous conclusion that the purposes of the exhaustion requirement are fully implicated in respondents' actions, even though respondents sought to bring these actions under § 1983.

"The rule of exhaustion in federal habeas corpus actions is," according to today's opinion, "rooted in considerations of federal-state comity. That principle was defined in *Younger v. Harris*, 401 U. S. 37, 44 (1971), as 'a proper respect for state functions,' and it has as

much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked." *Ante*, at 10. Moreover, the Court reasons that since the relationship between state prisoners and state officers is especially intimate, and since prison issues are peculiarly within state authority and expertise, "the States have an important interest in not being bypassed in the correction of those problems." *Ante*, at 17. With all respect, I cannot accept either the premises or the reasoning that lead to the Court's conclusion.

Although codified in the habeas corpus statute in 1948, 28 U. S. C. § 2254 (b), the exhaustion requirement is a "judicially-created instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.' *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A. C. 603, 609 (H. L.)." *Braden* v. *30th Judicial Circuit*, — U. S. —, — (1973). The undisputable concern of all our decisions concerning the doctrine has been the relationship "between the *judicial tribunals* of the Union and of the States . . . [T]he public good requires that these relations be not disturbed by unnecessary conflict between *courts* equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U. S. 241, 251 (1886) (emphasis added). *Ex parte Royall* is, of course, the germinal case, and its concern with the relations between state and federal *courts* is mirrored in our subsequent decisions. See, *e. g.*, *Braden* v. *30th Judicial Circuit*, *supra*, at —; *Baker* v. *Grice*, 169 U. S. 284, 291 (1898); *Ex parte Hawk*, 321 U. S. 114, 116–117 (1944); cf. *Soutre* v. *McGinnis*, 442 F. 2d 178, 182 (CA2 1971); *Edwards* v. *Schmidt*, 321 F. Supp. 68, 74–75 (WD Wis. 1971). We have grounded the doctrine squarely on the view that "it would be unseemly in our dual system

government for a federal district court to upset a state court *conviction* without an opportunity to the state courts to correct a constitutional violation." *Fay* v. *Noia*, 372 U. S. 391, 419–420 (1963) (emphasis added), quoting from *Darr* v. *Burford*, 339 U. S. 200, 204 (1950). See Parker, Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171, 172–173 (1948).

That is not to say, however, that the purposes of the doctrine are implicated only where an attack is directed at a state court *conviction* or *sentence*. *Ex parte Royall* itself did not involve a challenge to a state conviction, but rather an effort to secure a prisoner's release on habeas corpus "in advance of his trial in the [state] court in which he [was] indicted." *Id.*, at 253. But there too the focus was on relations between the state and federal *judiciaries*. It is a fundamental purpose of the exhaustion doctrine to preserve the "orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts, which can develop and correct errors of state and federal law and most effectively supervise and impose uniformity on trial courts." Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1094 (1970). Significantly, the identical interest in preserving the integrity and orderliness of judicial proceedings gives rise to the application of the exhaustion doctrine even where a federal prisoner attacks the action of a federal court. *Id.*, at 1094–1095. See, *e. g.*, *Bowen* v. *Johnston*, 306 U. S. 19, 26–27 (1939). In such a case, considerations of federalism obviously do not come into play. Yet the exhaustion requirement is nevertheless applied in order to prevent the disruption of the orderly conduct of judicial administration.

With these considerations in mind, it becomes clear that the Court's decision does not serve the fundamental

purposes behind the exhaustion doctrine. For although respondents were confined pursuant to the judgment of a state judicial tribunal, their claims do not relate to their convictions or sentences, but only to the administrative action of prison officials who subjected them to allegedly unconstitutional treatment, including the deprivation of good time credits. This is not a case, in other words, where federal intervention would interrupt a state proceeding or jeopardize the orderly administration of state judicial business. Nor is it a case where an action in federal court might imperil the relationship between state and federal courts. The "regularity of proceedings had in courts of coordinate jurisdiction," Parker, *supra*, at 173, is not in any sense at issue.

To be sure, respondents do call into question the constitutional validity of action by state officials, and friction between those officials and the federal court is by no means an inconceivable result. But standing alone, that possibility is simply not enough to warrant application of an exhaustion requirement. First, while we spoke in *Younger* v. *Harris*, 401 U. S. 37, 44 (1971), of the need for federal courts to maintain a "proper respect for state functions," neither that statement nor our holding there supports the instant application of the exhaustion doctrine. Our concern in *Younger* v. *Harris* was the "longstanding public policy against federal court interference with *state court proceedings*," *id.*, at 43 (emphasis added), by means of a federal injunction against the continuation of those proceedings. *Younger* is thus an instructive illustration of the very proposition that the Court regrettably misconstrues. It does not in any sense demand, or even counsel, today's decision.

Second, the situation that exists in the case before us—an attack on state administrative rather than judicial action—is the stereotypical situation in which relief

§ 1983 is authorized. See, *e. g.*, *McNeese* v. *Board of Education*, 373 U. S. 668 (attack on school districting scheme); *Damico* v. *California*, 389 U. S. 416 (1967) (attack on welfare requirements); *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) (attack on police conduct). In each of these cases the exercise of federal jurisdiction was potentially offensive to the State and its officials. In each of these cases the attack was directed at an important state function in an area in which the State has wide powers of regulation. Yet in each of these cases we explicitly held that exhaustion of state remedies was not required. And in comparable cases we have taken pains to insure that the abstention doctrine is not used to defeat the plaintiff's initial choice of a federal forum, see, *e. g.*, *Zwickler* v. *Koota*, 389 U. S. 241, 249 (1967), even though the plaintiff could reserve the right to litigate the federal claim in federal court at the conclusion of the state proceeding. *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964). Like Judge Kaufman, who concurred in the affirmance of the case now before us, "I cannot believe that federal jurisdiction in cases involving prisoners' rights is any more offensive to the state than federal jurisdiction in the areas" where the exhaustion requirement has been explicitly ruled inapplicable. 456 F. 2d, at 82.

Third, if the Court is correct in assuming that the exhaustion requirement must be applied whenever federal jurisdiction might be a source of substantial friction with the State, then I simply do not understand why the Court stops where it does in rolling back the district courts' jurisdiction under § 1983. Application of the exhaustion doctrine now turns on whether or not the action is directed at the fact or duration of the prisoner's confinement. It seems highly doubtful to me that a constitutional attack on prison conditions is any less disrup-

tive of federal-state relations than an attack on prison conditions joined with a plea for restoration of good time credits. Chief Judge Friendly expressed the view, as did the judges in dissent below, that "petitions of state prisoners complaining of the time or conditions of their confinement have the same potentialities for exacerbating federal-state relations as petitions attacking the validity of their confinement—perhaps even more." 456 F. 2d, at 80. Yet the Court holds today that exhaustion is required where a prisoner attacks the deprivation of good time credits, but not where he challenges only the conditions of his confinement. It seems obvious to me that both of those propositions cannot be correct.

Finally, the Court's decision may have the ironic effect of turning a situation where state and federal courts are not initially in conflict, into a situation where precisely such conflict does result. Since respondents' actions would neither interrupt a state judicial proceeding nor, even if successful, require the invalidation of a state judicial decision, "the question is simply whether one court or another is going to hear the case." Note, Exhaustion of State Remedies Under the Civil Rights Act, 68 Colum. L. Rev. 1201, 1205–1206 (1968). If we had held, consistently with our prior cases, that the plaintiff has the right to choose a federal forum, the exercise of that right would not offend or embarrass a state court with concurrent jurisdiction. Now, however, a prisoner who seeks restoration of good time credits must proceed first in state court, although he has the option of petitioning the federal court for relief if his state suit is unsuccessful. If the prisoner does resort to a federal habeas corpus action, the potential for friction with the State is certain to increase. The State is likely, after all, to derive little pleasure from the federal court's effort to determine whether there was "either an absence of available State corrective process or the existence of circumstances

making such process ineffective to protect the rights of the prisoner." 28 U. S. C. § 2254 (b). And since it is the validity of the state court's decision that is placed in issue, the State will have to endure a federal court inquiry into whether the State's factfinding process was adequate to afford a full and fair hearing, 28 U. S. C. § 2254 (d)(2), whether the petitioner was denied due process of law in the state court proceeding, *id.*, § 2254 (d)(6), and whether the state court's factual determinations are fairly supported by the record, *id.*, § 2254 (d)(8). (Townsend v. *Sain*, 372 U. S. 293 (1963). Since none of these questions would even arise if the Court had held that actions properly brought under § 1983, it seems a good deal premature to proclaim today's decision a major victory in our continuing effort to achieve a harmonious and healthy federal system.

IV

In short, I see no basis for concluding that jurisdiction under § 1983 is, in this instance, pre-empted by the habeas corpus remedy. Respondents' effort to bring these suits under the provisions of the Ku Klux Act should not be viewed as an attempted circumvention of the exhaustion requirement of the habeas corpus statute, for the effort does not in any sense conflict with the policies underlying that requirement.[24] By means of

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[24] In a case where the habeas corpus statute does provide an available and appropriate remedy, and where a prisoner's selection of an alternative remedy would undermine and effectively nullify the habeas corpus exhaustion requirement, it would, of course, be possible to view the suit as an impermissible attempt to circumvent that requirement. But by the same token, if a prisoner seeks to challenge only the conditions of his confinement—in which case the purposes underlying the exhaustion rule do not come into play—a filing should be considered a complaint under § 1983 even if the prisoner terms it a petition for habeas corpus. That result is consistent with the view that prisoner petitions should be liberally

these suits, they demand an immediate end to [illegible] under color of state law that has the alleged effect of violating fundamental rights guaranteed by the [illegible] Constitution. The Ku Klux Act was designed to afford an expeditious federal hearing for the resolution of precisely such claims as these. Since I share the Court's view that exhaustion of state judicial remedies is not required in any suit properly brought in federal court under § 1983, *ante*, at 1, and since I am convinced that respondents have properly invoked the jurisdictional grant of § 1983, I would affirm the judgment of the Court of Appeals.

VI

considered, *Price* v. *Johnson*, 334 U. S. 266 (1948), and it represents no threat to the integrity of the exhaustion doctrine. Nothing in today's decision suggests that the district courts should follow any other practice.